(26,783)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 697.

DANIEL O'CONNELL, DAVID J. SMITH, HERMAN B. SMITH, CARL J. F. WACHER, THOMAS CAREY, AND E. R. HOFFMAN, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print
Names and addresses	1	1
Præcipe for record	2	1
Indictment	3	2
Demurrer to indictment	10	6
Arraignment and plea, order overruling demurrer, and order denying motion for bill of particulars	25	16
Minutes of trial	27	17
Motion to quash indictment or direct verdict of not guilty	35	21
Order denying motion to quash, &c.	43	26
Minutes of trial	45	27
Motion to order a verdict of not guilty	51	30
Order denying motion to instruct jury to return verdict of not guilty, &c.	52	31
Verdict	55	32

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	Original.	Print
Engrossed bills of exceptions	56	33
Testimony of William C. Mengedoth	57	33
Offers of evidence, exhibits, &c.	65	38
Testimony of Albert J. McCarthy	67	40
John Murphy	68	40
Thomas McGuire	72	43
William J. Mowry	73	44
Edwin S. Parker	76	45
Joseph I. Savage	76	46
Miss Florence Kearns	77	47
S. B. Bankson	83	50
Don Rathbun	85	52
Mattie M. Barkley	87	53
Ashley Turner	93	57
Adam Mettler	97	59
Henry Christman	99	61
William A. Gray	103	63
Michael Guiney	108	66
Jacob M. Hirschman	111	68
Michael Donlon	117	72
Defendant's demurrer to indictment	121	75
Testimony of Mrs. Julia Manley	124	76
Alfred Wuestefeld	126	78
Joseph A. Lame	128	79
Christopher McCullough	131	81
Margaret Malloy Kraus	134	83
A. D. Bauer	141	87
Colloquy between court and counsel, &c.	142	88
Motion to quash indictment or direct verdict, &c.	153	94
Testimony of Margaret Malloy Kraus	161	99
D. A. Scannell	162	100
Martin Conway	163	101
Edgar O. Walker	166	103
Louis Serbin	174	108
Samuel Cohen	179	111
A. Wuestefeld	180	112
Carl J. F. Wacker	183	114
Russell L. Dunn	191	119
Daniel Yost	198	124
Michael Guiney	209	131
Ernest R. Hoffman	210	131
Miss L. D. Harding	226	142
David Jay Smith	226	142
Herman B. Smith	237	149
Thomas Carey	256	162
Wal J. Tuska	263	167
Ernest R. Hoffman (recalled)	269	172
Verdict	270	172
Motion in arrest of judgment	270	172
Motion for new trial	271	172
Certificate to bill of exceptions	274	174

	Original.	Print
Notice of motion to strike out proposed bill of exceptions.....	277	176
Motion to strike out proposed bill of exceptions.....	277	177
Defendants' answer to motion to strike out proposed bill of exceptions	279	178
Affidavit of T. C. West.....	286	182
Daniel O'Connell	288	183
Annette Abbott Adams.....	289	184
Order extending time, &c.....	293	186
Opinion on motion to strike, Van Fleet, J.....	294	187
Motion for new trial and notice.....	297	189
Motion in arrest of judgment.....	300	190
Sentence; motion for new trial denied; motion in arrest of judgment denied	302	192
Judgment on verdict.....	305	193
Petition for writ of error.....	308	195
Assignments of error	309	195
Order allowing writ of error.....	314	199
Stipulation and order transmitting certain exhibits, &c.....	315	199
Clerk's certificate	317	200
Writ of error.....	318	201
Clerk's return to writ of error.....	320	202
Citation	321	203

1 In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No. 6220.

THE UNITED STATES OF AMERICA

vs.

DANIEL O'CONNELL, DAVID J. SMITH, HERMAN B. SMITH, CARL J. F. WACHER, THOMAS CAREY, and E. R. HOFFMAN.

Names of Attorneys:

For Defendants and Plaintiffs in Error Carl J. F. Wacher, Thomas Carey and E. R. Hoffman: T. C. West Esq., and Walter McGovern, Esq., San Francisco.

For Defendants and Plaintiffs in Error David J. Smith and Herman B. Smith: C. A. Linn, Esq., San Francisco.

For Defendant and Plaintiff in Error Daniel O'Connell: in pro per.

For Plaintiff and Defendant in Error: United States Attorney, Northern District of California, San Francisco, California.

2 In the United States District Court for the Southern Division of the Northern District of California, Div. No. 1.

No. 6220.

THE UNITED STATES

vs.

DANIEL O'CONNELL et als.

Præcipe for the Record.

To W. B. Maling, Esquire, Clerk.

Sir: Please prepare a transcript of the record in the case of United States vs. Daniel O'Connell *et* als. and include therein the following papers:

Indictment.

Defendants' Demurrer to the Indictment.

Defendants' Motion to Quash or Order a Verdict of not Guilty at close of government's evidence.

Defendants' Motion to Direct a Verdict of Not Guilty at the close of all the evidence.

Defendant's Motion in Arrest of Judgment.

Defendants' Motion for New Trial.

Judgment, sentence.
Charge of the Court.
Assignments of Error.
Amended Assignment of Errors.
Petition for Writ of Error.
Order Allowing Writ of Error and Fixing of bail.
2½ Writ of Error Bond.
Writ of Error.
Citation in Error.
Bill of Exceptions.

Respectfully

DANIEL O'CONNELL,
Attorney for Defendants.

(Endorsed:) Filed Oct. 15, 1917, W. B. Maling, Clerk, by C. M. Taylor, Deputy Clerk.

3 (*Indictment.*)

In the Southern Division of the United States District Court for the Northern District of California, First Division.

At a Stated Term of said Court Begun and holden at the City and County of San Francisco, within and for the Southern Division of the Northern District of California, on the Second Monday of July, in the Year of Our Lord One Thousand Nine Hundred and Seventeen.

The Grand Jurors of the United States of America, within and for the Division and District aforesaid, on their oaths present that during all the times mentioned in this indictment, the United States of America has been at war with the German Empire; that Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacber, Thomas Carey, E. R. Hoffman and William C. Mengendoth, did, at San Francisco, in the Southern Division of the Northern District of California, on the sixteenth day of June, in the year of our Lord one thousand nine hundred and seventeen, knowingly and feloniously combine, conspire, confederate and agree together and with divers other persons whose names are to the Grand Jurors aforesaid, unknown, to commit an offense against the United States, to wit, the offense of knowingly and wilfully obstructing the recruiting and enlistment service of the United States to the injury of the said service, that is to say, they, the said defendants, did, at the time and place aforesaid, and while the United States of America was at war with the German Empire, as aforesaid, unlawfully, knowingly and feloniously conspire, combine, confederate and agree together, and with said divers other persons whose names are to the Grand
4 Jurors aforesaid, unknown, wilfully and knowingly to persuade and induce various men whose names are to these Grand Jurors unknown, between the ages of twenty-one and forty years, inclusive, to refuse to enlist in the military service of the

United States, and to persuade and induce male citizens of the United States and male persons who had declared their intention to become citizens of the United States, whose names are to these Grand Jurors unknown, and who were subject to military duty in the service of the United States Army under the provisions of the Act of May 18th, 1917, entitled, "An Act to authorize the President to Increase temporarily the Military Establishment of the United States," and known as the Selective Service Law, and the rules and regulations prescribed by the President in pursuance thereof, particularly those rules and regulations prescribed and approved May 18, 1917, all of which the said defendants then and there well know, to refuse to be enlisted and recruited in the Military service of the United States by selective draft, all to the injury of the said military service of the United States; that it was a part of the said conspiracy and the intention of the said defendants and the said parties with whom they did conspire to induce and persuade the said male persons between the ages of twenty-one and forty, inclusive, to refuse to enlist in the military service of the United States, and to induce and persuade the said persons between the ages of twenty-one and thirty years, inclusive, to refuse to register or to be registered under the provisions of said law and regulations, and to induce and persuade them to file false claims for exemption from said service, and to refuse to present themselves for physical examination under the provisions of the said Act and the rules and regulations made in pursuance thereof, or to submit to such physical examination to determine their physical fitness for military service, under the selective draft, and to refuse and fail to appear when called for military service under the said Act, Rules and Regulations.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that the said conspiracy and agreement between the said defendants and the said other persons, was continuously, throughout all the time from and after the said 16th day of June, 1917, and at all the time herein mentioned, and particularly at the time of the commission of each and all of the overt acts in this indictment set forth, in existence and in course of execution;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state that in pursuance of said conspiracy and to effect and accomplish the object thereof, the said defendants, Daniel O'Connell, David J. Smith and Herman B. Smith, did, at San Francisco, in the Southern Division of the Northern District of California, on or about the 12th day of July in the year of our Lord one thousand nine hundred and seventeen, cause to be incorporated an association called the "American Patriots."

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state that in pursuance of the said conspiracy and to effect and accomplish the object thereof, the said defendant, Thomas Carey, did, at San Francisco, in the Southern Division of the Northern District of California, on the 4th day of August, 1917, present to the Exemption Board for Division 4 of the City and County of San Francisco, for filing, a claim of exemption containing, among other things the following language:

6 "I am certain that notwithstanding all the humbug and lies published in the newspapers and other publications of the world, there is not, and cannot be, the slightest danger to the United States, as this war is simply a war of aggression, conquest, and greed on the part of England; and England and her agents have secured a vote of Congress assisting them in this war, which vote was in violation of the Constitution and will be reconsidered by the next Congress who will have full power and express directions from the people."

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in pursuance of said conspiracy and to effect and accomplish the object thereof, the said defendant, Daniel O'Connell, did, on or about the 4th day of August, 1917, go from San Francisco, California, to Lodi, California;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in pursuance of said conspiracy and to effect and accomplish the object thereof, the said defendant, Daniel O'Connell, did, at San Francisco, in the Southern Division of the Northern District of California, on or about August 1, 1917, prepare and cause to be distributed a document entitled "Legal opinion and advice on the Conscription Law to American Patriots."

Against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

Second Count.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: That Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacher, Thomas Carey, E. R. Hoffman, and William C. Mengendoth, did, at San Francisco, in the Southern Division of the Northern District of California, on the first
7 day of June, in the years of our Lord one thousand nine hundred and seventeen, knowingly and feloniously combine, conspire, confederate and agree together, and with divers other persons whose names are to the aforesaid Grand Jurors unknown, to commit an offense against the United States, that is to say, they, the said defendants, and said divers other persons whose names are to this Grand Jury unknown, did at the time and place aforesaid, knowingly and unlawfully conspire and agree together to make, and cause to be made false statements and certificates as to their liability and as to the liability of William Mettler, Jacob M. Hershman, Henry Christman, John Murphy, Harry Ungar, Reuben Ungar, and divers other persons whose names are to this Grand Jury unknown, for military service under the provisions of the Act of May 18, 1917, known as the Selective Service Law, and the regulations made by the President of the United States thereunder, and to evade and to aid, abet, counsel and induce the said William Mettler, Jacob M. Hershman, Henry Christman, John Murphy, Harry Ungar, Reuben Ungar, and said divers other persons whose names are to this Grand Jury unknown, all of whom were then and there male

persons who had attained their twenty-first birthdays and had not attained their thirty-first birthdays, and who were liable for military service under the said Selective Service Law, to evade the requirements of the above named Act and the regulations pursuant thereto made and approved by the President of the United States on the 18th day of May, 1917, and particularly to aid, abet, counsel and induce the said persons to refuse and fail to present themselves for the physical examination required under the provisions of the said Act, and the Rules and Regulations, made pursuant
8 thereto and approved by the President of the United States on the 18th day of May, 1917, to determine their physical fitness for military service, and to aid, abet, counsel and induce the said persons to fail and refuse to appear and report for military service, when called, certified and ordered to report in person for military service, under the terms of the said Act and Regulations, and to fail and refuse to do and perform any of the things required of them or any of them under the said Act and said Rules and Regulations.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that the said conspiracy and agreement between the said defendants and the said other persons, was continuously, throughout all the time from and after the said 1st day of June, 1917, and at all the time- herein mentioned, and particularly at the time of the commission of each and all of the overt acts in this indictment set forth; in existence and in course of execution;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state that in pursuance of said conspiracy and to effect and accomplish the object thereof, the said defendants, Daniel O'Connell, David J. Smith, and Herman B. Smith, did, at San Francisco, in the Southern Division of the Northern District of California, on or about the 12th day of July in the year of our Lord one thousand nine hundred and seventeen, cause to be incorporated an association called the "American Patriots."

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state that in pursuance of the said conspiracy and to effect and accomplish the object thereof, the said defendant, Thomas Carey, did, at San Francisco, in the Southern Division of the
9 Northern District of California, on the 4th day of August, 1917, present to the Exemption Board for Division 4 of the City and County of San Francisco, for filing, a claim of exemption containing among other things, the following language:

"I am certain that notwithstanding the humbug and lies published in the newspapers and other publications of the world, there is not, and cannot be, the slightest danger to the United States, as this war is simply a war of aggression, conquest, and greed on the part of England; and England and her agents have secured a vote of Congress assisting them in this war, which vote was in violation of the Constitution and will be reconsidered by the next Congress who will have full power and express directions from the people."

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in pursuance of said conspiracy and to effect and

accomplish the object thereof, the said defendant, Daniel O'Connell, did, on or about the 4th day of August, 1917, go from San Francisco, California, to Lodi, California;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in pursuance of said conspiracy and to effect and accomplish the object thereof, the said defendant, Daniel O'Connell, did, at San Francisco, in the Southern Division of the Northern District of California, on or about August 1, 1917, prepare and cause to be distributed a document entitled "Legal opinion and advice on the Conscription Law to American Patriots."

Against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

JOHN W. PRESTON,
United States Attorney.

(Endorsed:) A True Bill. Harry L. Tevis, Foreman Grand Jury. Presented in Open Court & Filed Sep 7 1917. W. B. Maling, Clerk, By C. W. Calbreath, Deputy Clerk.

10 In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 6220.

Div. 1.

THE UNITED STATES

vs.

DANIEL O'CONNELL et als.

Demurrer of Defendants to Indictment.

And the said defendants by Daniel O'Connell their Attorney come into Court and say that the said indictment and the matters and things therein set forth are in each and both of the two Counts thereof, as therein alleged and set forth, not sufficient in law to compel them the said defendants to answer thereto, for that:

I.

They do not allege or set forth facts sufficient to show or constitute an offense against the United States; or any offense whatever.

II.

The said first count is defective, because of its duplicity in that it sets forth different offenses if it sets forth any; and they are not punishable under the same statute, if at all; and are not provable by the same evidence, if by any evidence; and they are as follows:

1. The allegations in the first count of the indictment are that the defendants in carrying out the conspiracy of "knowingly and wilfully obstructing the recruiting and enlistment service to the injury of said service that is to say wilfully and knowingly."

2. "To persuade and induce verious men" "between the ages of 21 and 40 inclusive" "to refuse to enlist in the military service of the United States."

11 3. "and to persuade and induce male citizens of the United States and male persons who had declared their intention to become citizens of the United" * * * and who were subject to military duty in the service of the United States under the provisions of the Act of May 18, 1917, entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," and known as the Selective Service Law, and the rules and regulations prescribed by the President in pursuance thereof, all of which the said defendants then and there well knew, to refuse to be enlisted and recruited in the military service of the United States by selective draft, all to the injury of the said military service by the United States";

4. "To induce and persuade the said male persons between the ages of twenty-one and forty inclusive, to refuse to enlist in the military service of the United States,"

5. "and to induce the said persons between the ages of twenty-one and thirty years, inclusive, to refuse to register or to be registered under the provisions of said law and regulations,"

6. "and to induce and persuade them to file false claims for exemptions from said service and to refuse to present themselves for physical examination under the provisions of said Act and the rules and regulations made in pursuance thereof, or to submit to such physical examinations to determine their physical fitness for military service, under the selective draft."

III.

The said first Count of said indictment is further defective in that its allegations are inconsistent with, and repugnant to, each other, in the following, among other, particulars:

1. It is repugnant to itself in that the conspiracy charged is that of "knowingly and wilfully obstructing the recruiting and enlistment service" meaning by that, "that *it* is to say,"
12 the "persuading and inducing" certain persons not to do certain things alleged, which necessarily means mental consent and assent, and "obstructing" does not.

2. "Obstructing" necessarily means and includes, by force, or violence, or threats, or physical resistance; all of which are contradictory of, and inconsistent with, the words, and meaning of the words, "persuading and inducing."

3. Proof of "inducing and persuading" as alleged in the first Count of the indictment could not prove "obstructing" as contained in the statute, and therefore could not prove the crime set out in the statue, or indictment.

4. It is inconsistent with, and repugnant to the well settled meaning of the word "Obstruct" as defined in the dictionaries as follows:

"To block or stop up; to close; to bar; to be in the way of; to prevent; to impede; to oppose, to retard; to hinder." (Worcester's Dictionary.)

"To fill with impediments so as to prevent passage either wholly or in part; block or stop up; close by the interposition of obstacles." "To hinder or prevent from progress; check; stop; also, to retard the progress of; make the accomplishment of difficult and slow." (Standard Dictionary.)

"To block up; to stop up or close as a way, to place an obstacle in, or fill with obstacles or impediments to passing. To be or come in the way of; to hinder from passing, action, or operation; to stop, impede, retard." (Webster's Dictionary.)

5. It is inconsistent with, and repugnant to, the well settled meaning of the word "obstruct" as determined by the Courts as follows:

Resistance is opposing force to force, not retreating from force. Bouvier. State vs. Welch, 37 Wis., 196, 201. It is inconsist-
13 ent with mental consent or assent no matter how procured.

"To obstruct would seem to stand ex vi termini a direct and positive interposition, which prevented or tended to prevent the action of the officer in respect to a matter then to be proceeded in."

U. S. vs. Seeley, 27 Fed. Cases, page 1013.

U. S. vs. Carroll, 147 Fed., 953.

Persuading or attempting to persuade by bribery or otherwise is not "obstructing."

U. S. vs. Carroll, 147 Fed., 953.

6. It is inconsistent with, and repugnant to, the meaning placed by Congress and the Courts on the same word used in the Draft Act of March 3, 1863;

12 Stats. 731 and the Supplementary Acts of Feb. 24, 1864; 13 Stats. 6, which the Supreme Court (U. S. vs. Scott, 3 Wall., 642) declared was a legislative interpretation of the previous act. Section 13 of the previous Act makes it a crime for any person to "assault or obstruct any officer in making such draft or in performance of any service in relation thereto." Section 12 of the Second Act makes it a crime to "forcibly resist or oppose any enrollment * * * or who shall assault, obstruct, hinder, impede, or threaten any officer or other person employed in making or in aiding to make such enrollment." Again in the same sentence it describes the offense as "assaulting, obstructing, hindering or impeding."

7. It is inconsistent with, and repugnant to, the interpretation of these Acts given by Mr. Justice Miller in U.S. vs. McKay, Woolworth's C. C. Reports, p. 128, 134, 135, that it must be obstruction by resistance to an officer actually engaged in the work or service, and the guilty party must be moved by some motive having relation to the service in which the party obstructed is engaged."

14 In the case at bar it must be obstructing some officer while actually engaged in recruiting and enlistment and while *they* were so engaged. It must not be casual or incidental but an inten-

tional designedly obstructing, prompted by some motive which had relation to the recruiting and enlistment with which the particular officers obstructed were engaged in and done with this motive and sentiment and purpose.

8. "Induce" or "persuade" antonyms to "obstruct," or "resist." One is repugnant to the other. One is done without, and against, the consent; and the other is by securing full consent. "Obstruct," is opposing will to will and purpose to purpose. Induced or persuaded is after all opposition is gone so that the act is the one will, and with no opposition, or resistance; all carrying out the one purpose.

9. It is inconsistent, with, and repugnant to, the meaning intended by Congress. Congress never intended that "wilfully obstruct" in the Act of June 15, 1917, should mean "induce or persuade" because the punishment is a fine of not more than $10,000 or imprisonment for not more than twenty years or both, and a wife and children could be convicted of inducing and persuading the husband and father not to enlist; or the sister or daughter not to enlist as provided by law for the enlistment of women in the Navy as *Yoe*-women; or the sisters or brothers could be convicted of inducing and persuading the brother, or the sister, not to enlist or be recruited. This would follow as the inexorable effect of the law if the word "obstruct" included, or was intended to include "induce or persuade."

10. Congress is presumed to have intended not to go beyond its powers. Inducing and persuading can only be accomplished by speaking or printing or peaceable assemblings where both speaking and writing can be used. Congress has no power to abridge freedom of speech or press or the right of assembly and is expressly forbidden to do any legislating that would abridge any of these three rights. Therefore Congress never intended to make inducing or persuading a crime in these cases as that would abridge the freedom of speech, press, and assembly.

11. Congress knew that it could not do *that* indirectly that which it is forbidden to do directly. The constitutionality of a law is judged by its effect and operation. To make the inducement and persuading of friends or others not to enlist a felony, would have the effect of preventing people talking, or writing, or expressing their opinions, or wishes, on the subject, and to make it a conspiracy for two or more to do so, would abridge and prevent peaceable assembly. Therefore, if Congress so intended, then that law, or that much of it, would be unconstitutional and void, and therefore inducing and persuading could not be, and would not be, any part of the meaning of the word "obstruct" in the Act, and allegations of "inducing and persuading" could not, and would not, state the crime of "obstructing."

12. The Congress knew that the United States having been forbidden to legislate on the subject of free speech, free press and peaceable assembly, or to abridge the people's freedom in each, that therefore full and supreme power over these subjects remained in the several States and Congress could not, and cannot, in the slightest degree, interfere with the states, or the states' laws, on the subject,

and therefore in using the word "obstruct" never intended that they should include, or mean, "induce and persuade."

13. The Congress knew that the State of California had completely covered these subjects in the Constitution of the State which law is beyond the power of the United States to interfere with in the slightest degree, and if the word "obstruct" were construed
16 to mean "induce and persuade" then they would interfere with the following provisions of the said Constitution of the State of California:

"Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." Sec. 9, Art. I, Const. of Cal.

"The people shall have the right to freely assemble together to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances." Sec. 10, Art. I, Const. of Cal. See People vs. Seeley, 139 Cal., 118; Dailey vs. Superior Court, 112 Cal., 94.

Section 2, Art. I, Const. of Cala.

Section 1, Art. I, Const. of Cala.

Therefore the Congress never intended to interfere with these expressions of the Constitution of California and if they did their attempt would be void and of no effect.

14. The Congress never intended to make, as it had no power to make, and was also prohibited by the Constitution of the United States from making, the "persuading and inducing" as alleged in the indictment, a criminal offense; and the offering evidence of such "persuading and inducing," could not prove, or tend to prove, the crime alleged in the indictment, and the allegations of inducing and persuading are repugnant to the other parts of the indictment as well as the statute.

15. The subject matter of "persuading and inducing" was and is entirely in the jurisdiction of the State of California and the State of California has acted thereon in the Constitution of the State; and the Congress of the United States could not legislate upon the subject. They did not intend to and this is mere repugnance.

16. To hold that such allegations constitute a crime would be contradictory of and violate the provisions of Sections 1, 9, and 10 of Article I of the Constitution of the State of California which is the supreme law on the subject. This is a further reason for
17 the said claim of repugnance.

IV.

The said first count of said indictment is insufficient and uncertain in the following particulars:

1. The first overt act mentioned in indictment is that three of said defendants "caused to be incorporated an association called the American Patriots, at San Francisco, Cal., July 12, 1917," which allegation necessarily assumed that it was incorporated for a lawful pur-

pose as there cannot be any incorporation under the Constitution and laws of the State of California for other than a lawful purpose, and the lawful presumption — that the Secretary of State and other officials of the State of California complied with said Constitution and laws when they so incorporated said association, and said incorporation is a judgment by said duly authorized officials that said incorporation was for a lawful purpose and there are no other allegations in said indictment of the objects and purposes of said association and corporation.

2. The allegation of the second overt act is insufficient in that it is not alleged, and it does not appear that:

A. That the said Thomas Carey did not have the right to file a claim of exemption, or attempt to file a claim of exemption.

B. That said claim of exemption was false or not true.

C. That the "other things" in said claim of exemption did not change or in any way affect the meaning of the language quoted in said indictment, or what said other things were.

D. That the filing of a claim of legal exemption was not per se a lawful ministerial act provided by law to be performed by a citizen in his own behalf.

18 V.

The third overt act alleged in said indictment was lawful for Daniel O'Donnell to "go from San Francisco, California, to Lodi, California," and there is no allegation whatever that he said or did anything whatever unlawful, regardless of what his mental condition or mental purpose might have been on said August 4, 1917.

VI.

The fourth overt act alleged in said indictment was to prepare and cause to be distributed a document entitled "Legal opinion and advice on the Conscription Law to American Patriots" — appears to be perfectly lawful. There is not an allegation *of* any part *of* sentence or word of said legal opinion and advice; nor can this Court determine from said indictment whether the opinion or advice or both were sound or unsound, legal or illegal, except from the presumption of innocense of the defendants, and the construction of the pleadings against the pleader.

VII.

The said indictment does not allege or show the objects and purposes of said corporation, American Patriots; and does not allege or set forth or show the whole of said claim of exemption; and it does not allege that any part or all of said claim of exemption was false or untrue.

VIII.

The said first count does not set forth facts sufficient to constitute a crime or offense, because:

1. The Selective Service Law or draft act of May 18, 1917, referred to in the indictment was and is, unconstitutional and void in that the Constitution does not give any power or authority to pass it, and it was not for the purposes, or object, of the common defense of the United States, but for the object and purposes of offense, aggression and conquest, to change the form and substance of the Government of Germany and the German Empire, and to assist England and other nations of Europe called the "Allies," but not allies of the United States, in their internal affairs and also in their foreign affairs, and taking their side and part in their fights against, and quarrels with, Germany and the German Empire and what are called the Central Powers of Europe. It also violates the Constitution of the United States and the Amendments to the Constitution of the United States in the other particulars specified hereinafter.

2. The rules and regulations prescribed by the President and referred to in said indictment were made, and are, without authority of law, and in violation of the Constitution of the United States, especially in that they were made through a delegation of legislative power to the executive department which the Congress did not have power to delegate, and they are special, unfair, unequal and discriminating and arbitrary, and deprive citizens of the equal protection of the Constitution and laws of the United States and are the unwarranted exercise of legislative power on the part of the executive department of the United States.

IX.

The said Act approved May 18th, 1917, entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," and the Rules and Regulations prescribed by the President of the United States in pursuance thereof, and the Espionage Act of June 15, 1917, are each and all without any warrant or authority in law, and each and all are in violation of the Constitution of the said United States and the particular provisions of said Constitution so violated are as follows:

1. It violates Article I of the Constitution and particularly Subdivision 15 of Section 8 thereof, which confines the purposes for which the militia may be called to the following.

a. To execute the laws of the Union.
b. Suppress insurrection.
c. Repel invasion.

and Subdivision 16 of Section 8, Article I, which specifically reserves to the states the control of the militia.

2. It violates Article I of the Constitution and particularly Section 1 and Subdivision 1 of Section 8 of the said Article in that it assumes to delegate the powers specifically reserved to Congress, to wit; legislative powers and the power to raise and support armies, to the President of the United States.

3. It violates Sections 1 of Article XIII of the Amendments to the Constitution which prohibits involuntary servitude except as a punishment for crime, whereof the party shall have been duly convicted.

4. It violates the first Amendment to the Constitution prohibiting Congress from making any law respecting an establishment of religion in that it assumes to recognize a certain religion and to discriminate in favor of the adherents of such religion.

5. It violates the fifth Amendment to the Constitution in that it subjects citizens to deprivation of life, liberty or property without due process of law in that it assumes to confer upon the President of the United States discretionary and arbitrary powers in the selection of citizens for drafting into the army.

6. It violates Section 4 of Article IV of the Constitution which guarantees to every state of the union a republican form of government. By the terms of the Act of May 18, 1917, citizens of the various states may be kept in the army in foreign service during "the period of emergency," which may be forever, subject to military law and possibly under the command of a foreign non-republican government. If two million citizens can thus be drafted and kept under martial law, ten million can be so drafted, and the entire male population may be kept in the army indefinitely, thus substituting military autocracy for the republican form of government.

21 7. The Act also violates the following provisions of said Constitution:

Subdivisions 11, 12, 14 and 17 of Section 8 of Article I.
Sections 1 and 2 of Article III.
Second paragraph of Article VI.
Amendments IV, VI, IX and X.

8. The said Act was to remain in force only during the emergency then existing but which had ceased to exist prior to the filing of this indictment and has never existed since August 1, 1917, and does not exist and said act ceased to have any force after August 1, 1917.

9. The first sentence of the Constitution commonly called the preamble, stating the objects and purposes of the powers granted therein, is violated in *the* war was not declared, and is not conducted, for the common defense of the United States, but for the following purposes:—

A. The destruction of German autocracy in Germany.

B. The destruction of German militarism in Germany.

C. The driving out, or forcing out, of power in Germany, the present ruling family, called the Hohenzollern family or dynasty.

D. The making the world—not the United States—safe for democracy.

E. The restoration of Belgium to the King and other persons who ruled it before the war began in July, 1914.

F. The restoration of Servia, Montenegro, and Roumania, to their several rulers as they were before the war began in July, 1914.

G. The restoration of Alsace and Lorraine to France.

H. The assisting England and France and other nations, in carrying on a war against Germany and the German Empire, and

22 in the accomplishment of the purposes and objects of those nations, whatever those objects and purposes may finally be, but none of which are for the common defense of the United States.

I. This Court will take judicial notice of the official daily Bulletin published by the Government of the United States containing the messages, proclamations, speeches through Commissioners from belligerent nations, and other public acts of the President and officers of the executive and legislative departments of the government of the United States, which the Court must consider as established facts showing the objects and purposes in commencing and conducting this war, and passing and enforcing the said Act of May 18, 1917.

Demurrer to the Second Count.

The said second count of said indictment does not state facts sufficient to constitute an offense against the United States, or the laws of the United States, or any offense whatever.

II.

Said count is defective and uncertain in the following particulars:

1. It does not allege that there was a registration; or a drawing or that a physical examination was ordered.

2. It does not allege that there was any recruiting or enlistment deemed necessary, or allowed, or called for, by the President under the said Act of May 18, 1917; or that the President exercised the options given him in said Act, or that he deemed the call for a draft necessary, and the Court will take judicial notice of the fact that the President refused to recruit or enlist under said Act.

III.

Said count does not allege that any of the persons named or referred to therein, were, "male citizens, or male persons not
23 alien enemies who have declared their intention to become citizens between the ages of twenty-one and thirty, both inclusive," and therefore subject to enlistment or draft under said Act.

IV.

The said count is laid under section 6 of said Act but said section and the acts alleged in said count, apply only to officers or some persons, "charged with the duty of carrying into effect any of the provisions of the Act or the regulations made, or directions given thereunder," and it is not alleged in said count, or anywhere in said indictment, that all or any of the defendants or persons mentioned in said indictment, or either of the counts thereof, were officers, or persons charged with the duty of carrying into effect any of the provisions of the Act, or the Regulations made, or directions given thereunder, and said omission is a fatal defect in said count, as only such

officers or persons can commit the crime alleged in said second count.

V.

There is nothing in said Act, or in said count, or indictment, showing that defendants or any persons named in said count were required to make, or had any power or authority to make, or could make, any statement or certificate as to their liability, or anybody's liability for military service under the provisions of said Act, or any other Act, or any law or regulations whatever, or how they could commit the crime alleged.

VI.

The said count is defective because of its duplicity in that it sets forth four different alleged offences.

VII.

The said count is defective in that it sets forth no offence as the said Act of May 18, 1917, and the rules and regulations made thereunder are each and all unconstitutional and void for the reasons set forth in paragraph IX of the grounds of demurrer to the
24 first count of the said indictment.

And all this *he is* ready to verify.

Wherefore said defendants, Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacher, Thomas Carey, E. R. Hoffman, and William P. Mengendoth pray judgment and that they and each of them may be dismissed and discharged of the said indictment.

DANIEL O'CONNELL,
Attorney for Defendants.
WALTER R. DUNN.

(Endorsed:) Filed Sep. 11, 1917. W. B. Maling, Clerk, by C. W. Calbreath, Deputy Clerk.

25 At a Stated Term of the District Court of the United States for the Northern District of California, First Division, Held at the Court-room thereof, in the City and County of San Francisco, State of California, on Tuesday, the 11th Day of September, in the Year of our Lord One Thousand Nine Hundred and Seventeen.

Present: The Honorable, William C. Van Fleet, District Judge.

No. 6220.

UNITED STATES OF AMERICA

vs.

DANIEL O'CONNELL et al.

(Arraignment and Plea of Defendants.—Order Overruling Demurrer.—Order Denying Motion for Bill of Particulars.

The defendants Daniel O'Connell, David J. Smith Herman B. Smith, Carl J. F. Wacher, Thomas Carey, E. R. Hoffman and William Mengedoth were present in open Court with their attorneys Daniel O'Connell, Esq., and Walter R. Dunn, Esq. Upon motion of John W. Preston, Esq., United States Attorney, the defendants were called for arraignment, and each plead true name as indicted. The Defendants, through their attorney, presented a demurrer to the indictment, which, after hearing counsel, it was ordered that said demurrer be overruled, to which defendants entered exception. Mr. Preston then made a motion for an order striking defendants' demurrer from the files. After hearing Mr. Preston and Mr. O'Connell, the Court ordered that said defendants' demurrer stand as to the legal questions and that that part of the demurrer which is scurrilous and defamatory be, and the same is hereby stricken from the files of this Court. Each defendant entered a plea of not guilty. Mr. O'Connell then
26 made a motion for an order requiring the District Attorney to furnish defendants with a bill of particulars. After hearing counsel, the Court ordered that said motion be denied. Upon motion Mr. Preston, the Court ordered that the defendants be allowed to go on their own recognizance as to this Indictment. Mr. Dunn then stated to the Court that he desired to withdraw his name from the defendants' demurrer and that he desired to withdraw as attorney for all the defendants, except defendant William C. Mengedoth. Upon motion of Mr. Preston, the Court ordered that the trial of this case be, and the same is hereby set for September 12th, 1917.

27 At a Stated Term of the District Court of the United States for the Northern District of California, First Division, Held at the Court-room thereof, in the City and County of San Francisco, State of California, on Wednesday, the Twelfth Day of September, in the Year of Our Lord One Thousand Nine Hundred and Seventeen.

Present: The Honorable, William C. Van Fleet, District Judge.

No. 6220.

UNITED STATES OF AMERICA

vs.

DANIEL O'CONNELL et al.

(*Minutes of Trial.*)

This case came on regularly this day for the trial of defendants Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacher, Thomas Carey, E. R. Hoffman and William C. Mengedoth upon the Indictment herein against them. John W. Preston, Esq., United States Attorney for the Northern District of California, was present for and on behalf of the United States. Defendants David J. Smith and Herman B. Smith appeared in their own behalf and without counsel. Daniel O'Connell, Esq., appeared as counsel for defendants Carl J. F. Wacher, Thomas Carey and E. R. Hoffman. Walter R. Dunne, Esq., appeared as counsel on behalf of defendant William C. Mengedoth.

Upon the calling of the case, both parties answering ready for such trial, the Court ordered that the same do proceed and that the Jury Box be filled from the regular Panel of Trial Jurors of this Court. Accordingly the hereinafter named persons were duly drawn by lot, sworn, examined, etc., as follows: George V. McGlauflin, accepted; Thos. Alton and W. A. Doble, peremptorily challenged by defendants and excused; J. A. Miles peremptorily challenged
28 by the United States and excused; Willis C. Thoits, accepted; Fred L. Wight, Monroe G. West and Frank P. Brophy, peremptorily challenged by the defendants and excused; Fernand Bloch, John Landers and W. H. Ochsner, accepted; good cause appearing therefor and all parties consenting thereto, the Court ordered that Trial Juror, Chas. V. Patterson be, and he is hereby excused; Prince H. Look, accepted; C. H. Ashworth and Dwight M. Johnson, peremptorily challenged by defendants and excused; Thomas H. Haskins, Wesley Pieper, Leonard Brock, James H. Coulter, accepted; Mark McD. Graham and Frederick Kahn, peremptorily challenged by defendants and excused; George Plummer, accepted; Roy Ellis peremptorily challenged by defendants and excused; Wm. F. Cordes, peremptorily challenged by the United States and excused; and Alex Dulfer, accepted.

Thereupon twelve (12) persons having been accepted as Jurors to try defendants herein were accordingly sworn, to-wit:

George V. McGluaflin,
Willis C. Thoits,
Fernand Bloch,
John Landers,
W. H. Ochsner,
Prince H. Look,
Thos. H. Haskins.
Wesley Pieper,
Leonard Brock,
James H. Coulter,
George E. Plummer,
Alex Dulfer.

Mr. Preston thereupon made statement to the Court and Jury as to the nature of the action herein.

Thereupon, the hour of adjournment having arrived, the Court, after admonishing the Jury herein, ordered that the further trial of this case be, and the same is hereby continued to Thursday, September 13th, 1917, at 10 o'clock A. M., and that all parties be and appear on said day accordingly.

29 At a Stated Term of the District Court of the United States for the Northern District of California, First Division, Held at the Court-room thereof, in the City and County of San Francisco, State of California, on Thursday, the Thirteenth Day of September, in the Year of Our Lord One Thousand Nine Hundred and Seventeen.

Present: The Honorable, William C. Van Fleet, District Judge.

No. 6220.

UNITED STATES OF AMERICA

vs.

DANIEL O'CONNELL, DAVID J. SMITH, HERMAN B. SMITH, CARL J. F. WACKER, THOMAS CAREY, E. R. HOFFMAN, and WILLIAM C. MENGEDOTH.

(Minutes of Trial.)

The trial of defendants Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacher, Thomas Carey, E. R. Hoffman and William C. Mengedoth upon the Indictment herein against them was this day resumed. The Jury heretofore impaneled herein was present and complete. Defendants David J. Smith and Herman B. Smith appeared in their own behalf and without counsel. Daniel O'Connell, Esq., appeared as counsel for defendants Carl J. F. Wacher, Thomas Carey and E. R. Hoffman. Walter R. Dunn, Esq., appeared as counsel on behalf of defendant William C. Mengedoth. Mr. O'Connell made statement on behalf of certain defendants. Thereupon Mr. Preston called defendant William C. Mengedoth, who duly affirmed to tell the truth as a witness on behalf of the United States. Mr. Preston then called Albert J. McCarthy, John Murphy, William J. Mowry, Edwin S. Parker and Joseph I. Savage,

each of whom was duly sworn on behalf of the United States and examined, and introduced in evidence certain exhibits on behalf of the United States, which were filed and marked U. S. Exhibits Nos. 1 (*a*) and (*b*) Legal Opinion, etc., 2, (two letters), 3 (Articles of Incorporation), 4 (memorandum slips), 5 (list of fifteen moving picture houses of S. F., together with glass slide), 6 (Minutes of meetings of American Patriots) 7 (Agreement of W. E. Valencia), 8 (photograph, newspaper clipping and report from Police Department), 9 (Receipt), 10 (claim), 11 (letter), and 12 (claim). Mr. Preston also introduced another exhibit on behalf of the United States for identification, which was filed and marked U. S. Exhibit "A" for Identification. Thereupon, the hour of adjournment having arrived, the Court, after admonishing the Jury herein, ordered that the further trial of this case be, and the same is hereby continued to Friday, September 14th, 1917, at 10 o'clock A. M., and that all parties be and appear on said day accordingly.

At a Stated Term of the District Court of the United States for the Northern District of California, First Division, Held at the Court-room thereof, in the City and County of San Francisco, State of California, on Friday, the Fourteenth Day of September, in the Year of our Lord One Thousand Nine Hundred and Seventeen.

Present: The Honorable, William C. Van Fleet, District Judge.

No. 6220.

UNITED STATES OF AMERICA

vs.

DANIEL O'CONNELL et al.

(*Minutes of Trial.*)

The trial of defendants Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacker, Thomas Carey, E. R. Hoffman and William C. Mengedoth upon the Indictment herein against them was this day resumed. The Jury heretofore impaneled herein was present and complete. Defendants David J. Smith and Herman B. Smith appeared in their own behalf and without counsel. Daniel O'Connell, Esq., appeared as counsel for Defendant Carl J. F. Wacker, Thomas Carey and E. R. Hoffman. Walter R. Dunn, Esq., appeared as counsel on behalf of defendant William C. Mengedoth. Mr. Preston called Florence Kerns, S. B. Bankson, Don Rathbun, Miss Mattie M. Barkley, Thomas McGuire, Ashley Turner, Adam Mettler and Henry Christman, each of whom was duly sworn on behalf of the United States and examined, and introduced in evidence on behalf of the United States certain exhibits, which were filed and marked U. S. Exhibits Nos. 13 (card), 14 (speech of Herman B. Smith), 15 (two posters), 16 (Proclamation and War Program),

17 (letters), 18 (memorandum list), 19 (claim), and 20 (receipt).

32 Thereupon, the hour of adjournment having arrived, the court, after admonishing the Jury herein, ordered that the further trial of this case be, and the same is hereby continued to September 18th, 1917, at 10 o'clock a. m., and that all parties be and appear on said day accordingly.

33 At a Stated Term of the District Court of the United States for the Northern District of California, First Division, Held at the Court-room Thereof, in the City and County of San Francisco, State of California, on Tuesday, the 18th Day of September, in the Year of Our Lord One Thousand Nine Hundred and Seventeen.

Present: The Honorable, William C. Van Fleet, District Judge

No. 6220.

UNITED STATES OF AMERICA

vs.

DANIEL O'CONNELL et al.

(*Minutes of Trial.*)

The trial of defendants Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacker, Thomas Carey, E. R. Hoffman and William C. Mengedoth upon the Indictment herein against them was this day resumed. The Jury heretofore impaneled herein was present and complete. Defendants David J. Smith and Herman B. Smith appeared in their own behalf and without counsel. Daniel O'Connell, Esq., appeared as counsel for defendants Carl J. F. Wacker, Thomas Carey and E. R. Hoffman. Walter R. Dunn, Esq., appeared as counsel on behalf of defendant William C. Mengedoth. Mr. Preston called William A. Gray, who was duly sworn on behalf of the United States and examined, and recalled Jacob M. Herschman, who was further examined. Thereupon Mr. Preston called Michael Guiney, defendant Daniel O'Connell, Michael Donlon, Mrs. Julia Manley, Alfred Wuestefeld, Joseph A. Lame and Christopher McCullough, each of whom was duly sworn on behalf of the United States and examined, and introduced in evidence on behalf of the United States certain exhibits, which were filed and marked U. S. Exhibits Nos. 21 (*a*) (envelope and contents) and (*b*) (envel-
34 ope and contents), 22 (claim), 23 (U. S. Dist. Court records Nos. 6122 and 6123), 24 (claim), and 25 (claim). A certain exhibit was introduced for identification on behalf of defendants, filed and marked Defendants' Exhibit No. 1 for Identification, (two pamphlets, Opinion of Attorney General and Address to the Congress of the United States by Hannis Taylor).

Thereupon the hour of adjournment having arrived, the court, after admonishing the jury herein, ordered that the further trial of this case be, and the same is hereby continued to Wednesday, September 19th, 1917, at 10 o'clock a. m., and that all parties be and appear on said day accordingly.

35 In the Southern Division of the United States District Court for the Northern District of California, First Division.

Div. No. 1.

No. 6220.

THE UNITED STATES

vs.

DANIEL O'CONNELL et al.

Motion to Quash Indictment or Direct Verdict of Not Guilty.

Now come the defendants at the close of all the evidence offered for the government in the above entitled cause and before the offer of any evidence on the part of the defendants and move this Honorable Court to order and direct a verdict of not guilty. This motion is based upon the following among other grounds:

1. All the evidence for the government if assumed true in fact together with all reasonable inference therefrom is not legally sufficient to support a verdict of guilty.

2. The allegations and facts as set forth in the indictment, and in each of the first and second counts of the indictment, are not sufficient to constitute an offense under the constitution and laws of the United States for each and all of the specific grounds and reasons set forth in the demurrer of the defendants to the said indictment and counts which demurrer has been heretofore filed and overruled and which is hereby referred to and made a part of this motion.

3. No evidence has been offered to prove the first count of the indictment because proof of "inducing and persuading," as alleged in this count could not prove "obstructing" as alleged in that first count or in the statute because:

A. It is repugnant to itself in that the conspiracy charged is that of "Knowingly and wilfully obstructing the recruiting and
36 enlistment service" meaning by that, "that it is to say," the "persuading and inducing" certain persons not to do certain things alleged, which necessarily means mental consent and assent, and "obstructing" does not, and cannot mean that.

B. "Obstructing," necessarily means and includes, by force, or violence, or threats, or physical resistance; all of which are contradictory of, and inconsistent with, the words, and meaning of the words, "persuading and inducing."

C. Proof of "inducing and persuading" as alleged in the first Count of the indictment could not prove "obstructing" as contained

in the statute, and therefore could not prove the crime set out in the statute, or indictment.

D. It is inconsistent with, and repugnant to the well settled meaning of the word "Obstruct" as defined in the dictionaries as follows:

"To block or stop up; to close; to bar; to be in the way of; to prevent, to impede; to oppose; to retard; to hinder." (Worcester's Dictionary.)

"To fill with impediments so as to prevent passage either wholly or in part; block or stop up; close by the interposition of obstacles." "To hinder or prevent from progress; check; stop; also, to retard the progress of; make the accomplishment of difficult and slow." (Standard Dictionary.)

"To block up; to stop up or close as a way, to place an obstacle in, or fill with obstacles or impediments to passing. To be or come in the way of; to hinder from passing, action, or operation; to stop, impede, retard." (Webster's Dictionary.)

E. It is inconsistent with, and repugnant to, the well settled meaning of the word "obstruct" as determined by the Courts as follows:

Resistance is opposing force to force, not retreating from force. Bouvier. State vs. Welch 37 Wis. 196, 201. It is inconsistent with mental consent or assent no matter how procured. 37

"To obstruct would seem to stand ex vi termini a direct and positive interposition, which prevented or tended to prevent the action of the officer in respect to a matter then to be proceeded in."

U. S. vs. Seeley 27 Fed. Cases page 1013.

U. S. vs. Carroll 147 Fed. 953.

"Persuading and inducing" or attempting to "persuade and induce" (by bribery or otherwise,) is not "obstructing," and cannot be obstructing within the meaning of the Act of June 15, 1917.

U. S. vs. Carroll 147 Fed. 953.

F. It is inconsistent with, and repugnant to, the meaning placed by Congress and the Courts on the same words used in the Draft Act of March 3, 1863;

12 Stats. 731 and the Supplementary Act of Feb. 24, 1864; 13 Stats. 6, which the Supreme Court (U. S. vs. Scott, 3 Wall. 642) declared was a legislative interpretation of the previous act. Section 1e of the previous Act makes it a crime for any person to "assault or obstruct any officer in making such draft or in performance of any service in relation thereto." Section 12 of the Second Act makes it a crime to "forcibly resist or oppose any enrollment * * * or who shall assault, obstruct, hinder, impede, or threaten any officer or other person employed in making or in aiding to make such enrollment." Again in the same sentence it describes the offense as "assaulting, obstructing, hindering or impeding."

G. It is inconsistent with, and repugnant to, the interpretation of these Acts given by Mr. Justice Miller in

U. S. vs. McKay, Woolworth's C. C. Reports P-. 128, 134, 135, that it must be obstruction by resistance to an officer actually engaged in the work or service, and the guilty party must be moved by

some motive having relation to the service in which the party
38 obstructed is engaged."

In the case at bar it must be obstructing some officer while actually engaged in recruiting and enlistment and while they were so engaged. It must not be casual or incidental but an intentional designedly obstructing, prompted by some motive which had relation to the recruiting and enlistment with which the particular officers obstructed were engaged in and done with this motive and sentiment and purpose.

H. "Induce" or "persuade" antonyms to "obstruct," or "resist." One is repugnant to the other. One is done without, and against, the consent; and the other is by securing full consent. "Obstruct," is opposing will to will and purpose to purpose. Induced or persuaded is after all opposition is gone so that the act is the one will, and with no opposition, or resistance; all carrying out the one purpose.

I. It is inconsistent with, and repugnant to, the meaning intended by Congress. Congress never intended that "wilfully obstruct" in the Act of June 15, 1917, should mean "induce or persuade" because the punishment is a fine of not more than $10,000, or imprisonment for not more than twenty years or both, and a wife and children could be convicted of inducing and persuading the husband and father not to enlist; or the sister or daughter not to enlist as proficed by law for the enlistment of women in the Navy as Yoewomen; or the sisters or brothers could be convicted of inducing and persuading the brother, or the sister, not to enlist or be recruited. This would follow as the inexorable effect of the law if the word "obstruct" included, or was intended to include "induce or persuade."

J. Congress is presumed to have intended not to go behond its powers. Inducing and persuading can only be accomplished by speaking or printing or peaceable assemblings where both speaking and writing can be used. Congress has no power to abridge
39 freedom of speech or press or the right of assembly and is expressly forbidden to do any legislating that would abridge any of these three rights. Therefore Congress never intended to make inducing or persuading a crime in these cases as that would abridge the freedom of speech, press, and assembly.

K. Congress knew that it could not do *that* indirectly that which it is forbidden to do directly. The constitutionality of a law is judged by its effect and operation. To make the inducement and persuading of friends or others not to enlist a felony, would have the effect of preventing people talking, or writing, or expressing their opinions, or wishes, on the subject, and to make it a conspiracy for two or more to do so, would abridge and prevent peaceable assembly Therefore, if Congress so intended, then that law, or that much of it, would be unconstitutional and void, and therefore inducing and persuading could not be, and would not be, any part of the meaning of the word "obstruct" in the Act, and allegations of "inducing and persuading" could not, and would not, state the crime of "obstructing."

L. The Congress knew that the United States having been for-

bidden to Legislate on the subject of free speech, free press and peaceable assembly, or to abridge the people's freedom in each, that therefore full and supreme power over these subjects remained in the several states and Congress could not, and cannot, in the slightest degree, interfere with the states, or the states' laws, on the subject, and therefore in using the word "obstruct" never intended that they should include, or mean, "induce and persuade."

M. The Congress knew that the State of California had completely covered these subjects in the Constitution of the State which law is beyond the power of the United States to interfere with in the slightest degree, and if the word "obstruct" were construed to mean "induce and persuade" then they would interfere with the following provisions of the said Constitution of the State of
40 California:

"Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." Sec. 9, Art. I. Const. of Cal.

"The people shall have the right to freely assemble together to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances." Sec. 10, Art. I. Const. of Cal. See People vs. Seeley 139 Cal. 118; Daily vs. Superior Court 112 Cal. 94."

Section 2 Art. I. Const. of Cala.
Section I Art. I, Const. of Cala.

Therefore the Congress never intended to interfere with these expressions of the Constitution of California and if they did their attempt would be void and of no effect.

N. The Congress never intended to make, as it had no power to make and was also prohibited by the Constitution of the United States from making, the "persuading and inducing" as alleged in the indictment, a criminal offense; and the offering evidence of such "persuading and inducing" could not prove, or tend to prove, the crime alleged in the indictment, and the allegations of inducing and persuading are repugnant to the other parts of the indictment as well as the statute.

O. The subject matter of "persuading and inducing" was and is entirely in the jurisdiction of the State of California and the State of California has acted thereon in the Constitution of the State; and the Congress of the United States could not legislate upon the subject. They did not intend to and this is more repugnant.

P. To hold that such allegations constitute a crime would be contradictory of and violate the provisions of Sections 1, 9, and 10, of Article I of the Constitution of the State of California which is the supreme law on the subject. This is a further reason for the said claim of repugnance.

41 4. There was no evidence offered or admitted of any conspiracy charged in either the first or second count of the indictment.

5. None of the acts charged as overt acts were proved as overt

acts in pursuance of any conspiracy charged in either count of the indictment.

6. The strongest construction of the evidence against the defendants could not make such evidence any more than an agreement and understanding between persons to test the constitutionality of the draft act or acts of the legislative or executive departments of the government, which agreement or understanding could not be an offense against the United States, and it is also protected by Section 37 of the Penal Code of the United States.

7. Such an agreement or understanding could not possibly be construed into an obstruction or conspiracy to obstruct or to evade any law of the United States.

8. All the evidence offered is off circulars and other printed matter circulating among the people and also of speeches at public assembly-s in which acts of the legislative and executive departments of the government were considered and conversations between attorney and clients on constitutional and other legal questions and on advice as to the best method of protecting the legal rights of the client, especially his property, liberty and life from what he considered unauthorized acts of officers of the government, and also conversations between the President of a corporation and the members of the corporation on the same subject and for the same purposes, and Congress has no power to legislate on such subjects and is also prohibited from abridging the rights of peaceable assembly, free speech and free press and cannot indirectly or by construction do that which it has no power to do and is directly forbidden to do.

9. The State of California in its Constitution has fully legislated on these subjects of assembly, speech and the press, and has supreme, plenary and exclusive power to legislate on these subjects. The conspiracies charged in the indictment require that the defendants must commit an offense which could be carried into effect only by violating the laws of the United States.

Wilson vs. U. S. 190 Fed. 427;
Fain vs. U. S. 209 Fed. 525;
U. S. vs. Biggs 211 U. S. 507;

Only the laws of the State of California could be violated by anything done in peaceable assembly or by way of speech or of the press.

10. There is no evidence whatever of "the making of any false statement or certificate as to the fitness or liability" of any of the defendants or of any other person for service under the provisions of the Act of Congress of May 18, 1917, or regulations made by the President.

11. There is no evidence of "the union of two or more persons, the conscious participation of two or more minds, which is indispensible to the conspiracy." The evidence is only of facts as consistent with innocence as with guilt. There is no substantial evidence of facts which exclude- every other hypothesis but that of guilt; all the substantial evidence is as consistent with innocence as with guilt.

Union Pacific vs. U. S. 173 Fed. 740.

DANIEL O'CONNELL,
Attorney for Defendants.

(Endorsed:) Filed Sept. 19, 1917. W. B. Maling, Clerk, by Lyle S. Morris, Deputy Clerk.

43 At a Stated Term of the District Court of the United States for the Northern District of California, First Division, Held at the Court-room thereof, in the City and County of San Francisco, State of California, on Wednesday, the 19th Day of September, in the Year of our Lord One Thousand Nine Hundred and Seventeen.

Present: The Honorable, William C. Van Fleet, District Judge.

No. 6220.

UNITED STATES OF AMERICA

vs.

DANIEL O'CONNELL et al.

(Minutes of Trial—Order Denying Motion to Quash or Direct Verdict of Not Guilty.)

The trial of defendants Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacker, Thomas Carey, E. R. Hoffman and William C. Mengedoth upon the indictment herein against them was this day resumed. The Jury heretofore impaneled herein was present and complete. Defendants David J. Smith and Herman B. Smith appeared in their own behalf and without counsel. Daniel O'Connell, Esq., appeared as counsel for defendants Carl J. F. Wacker, Thomas Carey and E. R. Hoffman. Walter R. Dunn, Esq., appeared as counsel on behalf of defendant William C. Mengedoth.

Mr. Preston called Mrs. Margaret M. Kraus and A. D. Bauer, each of whom was duly sworn on behalf of the United States and examined, and thereupon rested the case on behalf of the United States.

Mr. O'Connell thereupon made a motion to strike out certain evidence and a motion to quash Indictment or return verdict of not guilty, which motions the Court ordered, and the same are hereby denied. Mr. O'Connell then recalled Mrs. Margaret M. Kraus,

44 who was further examined, and then called D. A. Scannell, Martin Conway and Edgar C. Walker, each of whom was duly sworn on behalf of the defendants and examined.

Mr. Preston introduced in evidence on behalf of the United States certain exhibits, which were filed and marked U. S. Exhibits Nos. 26 (By Laws of American Patriots), and 27 (four envelopes and contents).

Thereupon the hour of adjournment having arrived, the Court, after admonishing the Jury herein, ordered that the further trial of this case be, and the same is hereby continued to Thursday, September 20th, 1917, at 10 o'clock A. M., and that all parties be and appear on said day accordingly.

45 At a Stated Term of the District Court of the United States for the Northern District of California, First Division, Held at the Court-room thereof, in the City and County of San Francisco, State of California, on Thursday, the 20th Day of September, in the Year of our Lord One Thousand Nine Hundred and Seventeen.

Present: The Honorable, William C. Van Fleet, District Judge.

No. 6220.

UNITED STATES OF AMERICA

vs.

DANIEL O'CONNELL et al.

(*Minutes of Trial.*)

The trial of defendants Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacker, Thomas Carey, E. R. Hoffman and William C. Mengedoth upon the Indictment herein against them was this day resumed. The Jury heretofore impaneled herein was present and complete. Defendants David J. Smith and Herman B. Smith appeared in their own behalf and without counsel. Daniel O'Connell, Esq., appeared as counsel for defendants Carl J. F. Wacher, Thomas Carey and E. R. Hoffman. Walter R. Dunn, Esq., appeared as counsel on behalf of defendant William C. Mengedoth.

Edgar C. Walker resumed the stand and was further examined on behalf of the defendants and thereupon Louis Serbin and Samuel Cohen were recalled as witnesses on behalf of defendants, each of whom was duly sworn on behalf of said defendants and examined. Thereupon Alfred Wuestefeld and Carl J. F. Wacker were duly sworn on behalf of defendants and examined. Defendants introduced in evidence a certain exhibit, which was filed and marked Defendants' Exhibit "A" (Speech of Mr. O'Connell).

46 Thereupon the hour of adjournment having arrived, the Court, after admonishing the Jury herein, ordered that the further trial of this case be, and the same is hereby continued to Friday, September 21st, 1917, at 10 o'clock A. M., and that all parties be and appear on said day accordingly.

47 At a Stated Term of the District Court of the United States for the Northern District of California, First Division, Held at the Court-room thereof, in the City and County of San Francisco, State of California, on Friday, the 21st Day of September, in the Year of our Lord One Thousand Nine Hundred and Seventeen.

Present: The Honorable, William C. Van Fleet, District Judge.

No. 6220.

UNITED STATES OF AMERICA

vs.

DANIEL O'CONNELL et al.

(*Minutes of Trial.*)

The trial of defendants Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacker, Thomas Carey, E. R. Hoffman and William C. Mengedoth upon the Indictment herein against them was this day resumed. The Jury heretofore impaneled herein was present and complete. Defendants David J. Smith and Herman B. Smith appeared in their own behalf and without counsel. Daniel O'Connell, Esq., appeared as counsel for Defendants Carl J. F. Wacker, Thomas Carey and E. R. Hoffman. Walter R. Dunn, Esq., appeared as counsel on behalf of defendant William C. Mengedoth.

Thereupon Mr. O'Connell called Russell L. Dunn and Daniel Yost, each of whom was duly sworn on behalf of defendants and examined, and recalled Michael Guiney as a witness on behalf of defendant-, who was further examined. Thereupon Ernest R. Hoffman was duly sworn on behalf of defendants. Thereupon a certain exhibit was introduced in evidence on behalf of defendants, which was filed and marked Defendants' Exhibit "B" (receipt from E. R. Hoffman to Michael Guiney).

48 Thereupon the hour of adjournment having arrived, the Court, after admonishing the Jury herein, ordered that the further trial of this case be, and the same is hereby continued to Monday, September 24th, 1917, at 10 o'clock A. M., and that all parties be and appear on said day accordingly.

49 At a Stated Term of the District Court of the United States, for the Northern District of California, First Division, Held at the Court-room thereof, in the City and County of San Francisco, State of California, on Monday, the twenty fourth day of September, in the Year of Our Lord One Thousand Nine Hundred and Seventeen.

Present: The Honorable, William C. Van Fleet, District Judge.

No. 6220.

UNITED STATES OF AMERICA

vs.

DANIEL O'CONNELL et al.

(*Minutes of Trial.*)

The trial of defendants Daniel O'Connell, Herman B. Smith, David J. Smith, Carl J. F. Wacker, Thomas Carey, E. R. Hoffman and William C. Mengedoth upon the Indictment herein against them was this day resumed. The Jury heretofore impaneled herein was present and complete. Defendants David J. Smith and Herman B. Smith appeared in their own behalf and without counsel. Daniel O'Connell, Esq., appeared as counsel for defendants Carl J. F. Wacker, Thomas Carey and E. R. Hoffman. Walter R. Dunn, Esq., appeared as counsel on behalf of defendant William C. Mengedoth. Defendant E. R. Hoffman resumed the stand and further testified on behalf of defendants. Mr. O'Connell then called Miss L. D. Harding, David Jay Smith and Herman B. Smith, each of whom was duly sworn on behalf of the defendants and examined, and introduced in evidence a certain exhibit on behalf of the defendants, which was filed and marked Defendants' Exhibit "C" (Circular—"Lovers of Peace"). Mr. O'Connell also introduced a certain exhibit for identification on behalf of said defend-
50 ants, which was filed and marked Defendants' Exhibit 2 for Identification (Address of Daniel O'Connell given on August 21st, 1917).

Thereupon the hour of adjournment having arrived, the Court, after admonishing the Jury herein, ordered that the further trial of this case be, and the same is hereby continued to Tuesday, September 25th, 1917, at 10 o'clock A. M., and that all parties be and appear on said day accordingly.

51 In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 6220.

Div. 1.

THE UNITED STATES

vs.

DANIEL O'CONNELL et al.

Motion to Order a Verdict of Not Guilty.

Now come the defendants at the close of the evidence and before the arguments and moves this Honorable Court to direct the jury to return a verdict of not guilty in favor of each and all the defendants.

Said motion is made upon the following among other grounds:

1. The evidence is entirely consistent with innocence.
2. The evidence is inconsistent with guilt.
3. The offense charged, in each count of the indictment, has not been proved beyond a reasonable doubt.
4. There has been no proof of any conspiracy, charged in either count of the indictment, and everything done by the defendants was within their constitutional rights, and nothing was done to effect the objects of any conspiracy charged in either count of the indictment.
5. Upon each and all of the grounds stated in the previous motion to direct a verdict of not guilty at the close of the Government's evidence which motion is on file in this case and is hereby referred to and made a part of this motion to save incumbering the record with repeating the detailed statement of grounds of said previous motion.
6. The evidence is not sufficient to sustain a verdict of guilty against any or all of the defendants.

DANIEL O'CONNELL,
Attorney for Defendants.

(Endorsed:) Filed Sept. 25, 1917. W. B. Maling, Clerk, by Lyle S. Morris, Deputy Clerk.

52 At a Stated Term of the District Court of the United States for the Northern District of California, First Division, Held at the Court-room thereof, in the City and County of San Francisco, State of California, on Tuesday, the Twenty-fifth Day of September, in the Year of Our Lord One Thousand Nine Hundred and Seventeen.

Present: The Honorable, William C. Van Fleet, District Judge.

No. 6220.

UNITED STATES OF AMERICA

vs.

DANIEL O'CONNELL et al.

(*Minutes of Trial—Order Denying Motion to Instruct Jury to Return Verdict of Not Guilty at Close of Evidence—Minutes of Verdict.*)

The trial of defendants Daniel O'Connell, Herman B. Smith, David J. Smith, Carl J. F. Wecker, Thomas Carey, E. R. Hoffman, and William C. Mengedoth upon the Indictment herein against them was this day resumed. The Jury heretofore impaneled herein was present and complete. Defendants David J. Smith and Herman B. Smith appeared in their own behalf and without counsel. Daniel O'Connell, Esq., appeared as counsel for defendants Carl J. F. Wacker, Thomas Carey and E. R. Hoffman. Walter R. Dunn, Esq., appeared as counsel on behalf of defendant William C. Mengedoth.

Defendant Herman B. Smith resumed the stand and further testified on behalf of defendants. Thereupon defendant Thomas Carey and Walter J. Tuska, were duly sworn on behalf of defendants and examined. Thereupon the case was rested on behalf of defendants. Mr. Preston recalled Ernest R. Hoffman, who was further examined, and rested case on behalf of the United States.

53 Defendants thereupon made a motion to instruct the Jury to return a verdict of not guilty at the close of the evidence. After due consideration had thereon, the Court ordered that said motion be and same is hereby denied.

The case was thereupon argued by Mrs. Adams, Mr. David J. Smith, Mr. O'Connell, Mr. Herman B. Smith and Mr. Preston and submitted, whereupon the Court proceeded to instruct the Jury herein, who, after being so instructed, retired at 5 o'clock and 25 minutes P. M., to deliberate upon a verdict and subsequently returned into Court at 6 o'clock and 35 minutes P. M., and upon being called all twelve (12) jurors answered to their names and were found to be present and in answer to question of the Court, stated that they had agreed upon a verdict and presented a written verdict, which the Court ordered filed and recorded, to-wit:

"We, the Jury, find Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacker, Thomas Carey and E. R. Hoffman the

defendants at the bar, Guilty on the — count of the Indictment and — on the — count of the Indictment.

THOMAS H. HASKINS, *Foreman.*"

Thereupon the Court ordered that the Jurors herein be, and they are hereby excused until September 26th, 1917, at 10 o'clock A. M. except as to the following Jurors, to-wit: Trial Juror W. H. Ochsner excused until October 30th, 1917, at 10 o'clock A. M., and Trial Jurors John Landers, Fernand Block, George V. McGlauflin, Wesley Pieper, Willis C. Thoits and George E. Plummer excused until October 16th, 1917, at 10 o'clock A. M.

After hearing counsel, further ordered that defendants herein be admitted to bail, pending tne determination of the appeal herein as follows: Bond of defendant Daniel O'Connell fixed at the sum of Twenty-five Thousand (25,000) Dollars and each of the other defendants in the sum of Ten Thousand (10,000) Dollars and that said defendants have until September 26th, 1917, within which to give such bonds. Further ordered that said defendants go at
54 large upon the bonds heretofore given and filed in the case of United States of America vs. Daniel O'Connell et al., No. 6187, until said September 26th, 1917.

Further ordered that this case be, and the same is hereby continued to Saturday, September 29th, 1917, at 10 o'clock A. M., for the pronouncing of judgments upon said defendants.

55 In the District Court of the United States in and for the Northern District of California, First Division.

No. 6220.

THE UNITED STATES OF AMERICA

vs.

DANIEL O'CONNELL et al.

(*Verdict.*)

We, the Jury, find Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacher, Thomas Carey, and E. R. Hoffman the defendants at the bar, Guilty on the — Count of the Indictment, and — on the — count of the Indictment.

THOMAS H. HASKINS, *Foreman.*

(Endorsed:) Filed Sept. 25, 1917, at 6 o'clock and 35 minutes P. M. W. B. Maling, Clerk, by Lyle S. Morris, Deputy Clerk.

56 In the United States District Court for the Northern District of California, Southern Division.

Div. No. 1.

No. 6220.

UNITED STATES, Plaintiff,

vs.

DANIEL O'CONNELL et als.

Engrossed Bills of Exceptions.

Be it remembered that upon the arraignment of the defendants in said cause in the July 1917 term, on September 11, 1917, the said defendants demurred to said indictment, a copy of which demurrer is in the transcript and made a part of this Bill of Exceptions.

Exception No. 1.

Said demurrer was overruled by the Court and denied, to which ruling of the Court, defendants then and there duly excepted and now designate it as Exception No. 1.

Said defendants being then and there arraigned in person, appeared and pleaded not guilty to said indictment. Be it remembered that on September 12, A. D. 1917 being one of the days of July term of said Court, this cause came on to be heard before his Honor, Judge William C. Van Fleet, one of the Judges of said Court, John W. Preston, United States Attorney, and Annette Abbott Adams, Assistant United States Attorney, appearing for the Government and Daniel O'Connell appearing as Counsel for himself and for defendants Wacker, Carey, and Hoffman, and David J. Smith and Herman D. Smith, appearing in their own behalf without counsel and a jury therein duly sworn to try said cause and the United States to
57 maintain the issues on its part called as witnesses, the following named persons, who being duly sworn, testified as follows:

The first witness was defendant WILLIAM C. MENGEDOTH, and before he was sworn the United States Attorney said he was a defendant in the case but that he was willing that the case be nolle prossed as to Mr. Mengedoth for the purpose of calling him as a witness, and asked Mr. Mengedoth to agree to that which he did then and there in open court, and was sworn as a witness and testified as follows: "I am Paster of the Evangelical Association and in charge of a church at Lodi, Cal. since June 1915, am a citizen of the United States of German birth, but have resided in this country about 25 years, am a member of the American Union against Militarism since May or June, 1917, whose headquarters are at Washington, D. C., and New

York. Some of its present officers are David Starr Jordan, Mr. Pinchot, Miss Adams. I first met the defendant Daniel O'Connell the first part of August, 1917, because his name appeared on the letter head of the American Union Against Militarism, as the counsel for California, which was how I got the information that he was interested. The names of the attorneys in other places were on the same letter head, and my first intercourse with Mr. O'Connell was by sending him a letter, I have not a copy, but I wrote a similar letter at the same time to Mr. Dunn who was the attorney for Oakland, Cal. and I wrote both letters on the same date."

"The letter to Mr. O'Connell was dated July 23, 1917, and told him that we have conscientious objectors who have been drafted and who refuse to bear arms, what is the procedure for them. The reply stated that the draft act was unconstitutional and it had to be tested in the Court by Judge and Jury and the proper thing to do was to file a proper exemption affidavit and he advised them to join the American Patriots."

58 (The witness was then shown a letter addressed to Mr. O'Connell bearing the signature of the witness and found among the papers of the American Patriots, containing a list of names of persons, who were willing to join the American Patriots). The defendants objected to its admission on the same grounds that it was immaterial, irrelevant and incompetent and no proper foundation had been made for it, but the Court overruled the objection and the letter was read to the Jury and subsequently admitted in evidence, as United States Exhibit 18, (Original to be transmitted to Supreme Court pursuant to stipulation).

The witness further testified: when this letter was sent, these were the names for the American Patriots that were willing to join, I believe, that is Sam Lockemeyer's letterhead; he is a member of my church. I know a few of these parties; the majority of them I do not know. There are twenty-three names on the list and I know that six or eight of them are within the draft age. The boys had already signed the application for membership in the American Patriots, but their names had not been sent in to the headquarters. They had come to me and asked for advice and I told them that I could not give them any advice. They asked about the American Patriots and I said I did not know anything about it, and could not tell them whether to join, or not to join, and they requested me to come to San Francisco and find out from Mr. O'Connell and others about the American Patriots. This conversation was with Samuel Lockemeyer, Henry Christman and others, and as their representative I came to San Francisco, also representing at least a dozen of the draft age. I also represented others not within the draft age, some, of whom, were parents, whose boys were within the draft age and some of whom were parishioners of mine. I paid my
59 own expenses, I came to San Francisco and inquired who Mr. O'Connell was at different places in the city and could find out nothing about Mr. O'Connell and I then went over to Mr.

O'Connell's office and told him that there were boys who wanted to join the American Patriots, and requested him to write to them as they wanted to see Mr. O'Connell and hear him speak personally. I asked him if he would come over to Lodi and address the boys or see the boys and Mr. O'Connell said he was willing to see the boys. He said the American Patriots was a corporation and with that message, I went home. I did not take any legal opinion with me at that time and did not get any at that time. The boys did not make any statement to me at that time of whether they wanted to go to war or were going to refuse to go to war. They wanted to know what kind of an organization the American Patriots was. I told the boys that it seems that it is incorporated and that it must be all right I guess, and for that reason they told me to go to see Mr. O'Connell and I said that I would be very willing to go and see Mr. O'Connell and I said that I would be very willing to go and see him and find out for them. I requested him to write them personally, but I believe that he suggested that he write one instead of more and that he would come down and speak to them or see them. The kind of relief they wanted from the American Patriots was to know about the constitutionality of the draft act, and that is what I told Mr. O'Connell in his office at that time. I asked him if the draft act was legal or constitutional, or something like that. He said to me that had to be tested in Court. Then I asked him about joining the American Patriots. The boys had signed the slips but they didn't send them in or their fees or anything of the kind because they wanted to first find out what the corporation was.

60 I said to Mr. O'Connell "how is it about fees," he said the entrance fee would be $5.00 and $1.00 monthly for the reason that this fight to test the law in court would be too much for one person but by all co-operating it would be easier to do that. He wrote something on the top of one of the application blanks that it would be $5.00 initiation fee and one dollar a month, and that one alone could not test it in the court but co-operating together they would be able to do so. He stated that it would be too much for a poor man.

I don't know as he said anything on the subject of what would become of these boys of draft age, represented by me during the time he was testing the case in court. I did not ask him as to whether or not these boys could wait to go into the service until after he had taken the case to the Supreme Court of the United States.

At this point the Court asked the following questions: "The Court. Q. Did he say whether they could be drafted in the meantime, or what did he say? What advantage was it for them to get into the corporation if it did not save them from the draft—did he say anything about that? A. No, he did not say anything about that to my knowledge."

The witness resumed his testimony as follows: "I carried back to my people at Lodi the message that Mr. O'Connell had suggested that he would come to Lodi and make a speech. I didn't arrange for him to come to Lodi and make a speech, that was later on. I

came to San Francisco later when he said he was going to come over to Lodi and speak for them. About August 1st my second trip, I got the legal opinion in Mr. O'Connell's office or the adjoin-
61 ing office, it was on a desk or around there somewhere, I don't know what I did with it. Some of it was typewritten, and some written. I believe I gave it back to Mr. O'Connell. There was something written in handwriting in different places. I was not interested in it at all. (Mr. O'Connell then produced the opinion which the witness identified as the one in question which was then offered in evidence, and read to the Jury and marked "U. S. Exhibit No. 1") (The original of this exhibit to be transmitted to the Supreme Court pursuant to stipulation.) The witness further testified as follows: "I did not show it to any body I took it home because it was a legal opinion. This was on Monday, I got home Tuesday night, about one o'clock and had to leave early next morning for Fresno, and had no time to show it to the boys, although I intended to show it to them. I did not make arrangements with Mr. Hawley to take care of the meeting for me, and I had not intended to preside at the meeting. Mr. Hawley had charge of the local arrangements for the meeting. I gave no advice to Henry Christman or Adam Mettler, as to how they should behave at the time they were called before the exemption boards, and I told them nothing that I communicated to Mr. O'Connell—did not know that these two men were to resist the draft in any way. I was in Los Angeles when they were called before the Board at Stockton.

Mr. O'Connell did not explain the exemption affidavit to me, did not show one of them, don't know that I ever saw one. In the beginning after the boys were registered I wrote out some conscientious objections for them from the religious standpoint before I had talked or knew anything of Mr. O'Connell, and my talk with him had nothing to do with the paper I wrote." I can produce a copy of what I wrote (which copy the witness then and there produced.)
62 The witness further testified as follows: "I attended one of the meetings in Dreamland Rink in San Francisco some time in August, at which Rev. Whittaker of Los Gatos presided, and Mr. O'Connell, Mr. Mills and three gentlemen from Arizona were orators, don't know whether these three were I. W. W.'s but they spoke of the I. W. W. riot.

When I got into Dreamland Rink, Dr. E. R. Hoffman, one of the defendants, said, "we learn you are indicted." I met Dr. Hoffman at the same time I met Mr. O'Connell. I never met the defendant, Herman B. Smith until the morning after we were indicted. The only defendants I had met before were Dr. Hoffman and Mr. O'Connell. I haven't anything to do with the corporation of American Patriots and was never arrested before. I- was the first time I was indicted and was a surprise to me when I saw it in "The Call" the night of the Dreamland meeting.

These young men I represent at Lodi paid money to me for the American Patriots, in all it was about $80.00. I turned that money over to Mr. Samuel Lockmeyer and told him that as soon as they were satisfied with Mr. O'Connell and they wanted to join the American

Patriots, then he should send the money to Mr. O'Connell or give it to him. As their Pastor I could not advise any of my parishioners to join any corporation or company whatever until they found out for themselves for sure. And it was after I came down to San Francisco that I had them pay me the money. When I came back to Lodi they asked me what I knew about Mr. O'Connell, and I said that as much as I knew about the man he appears to be all right, but I don't know anything about him. The best thing for you to do is determine for yourselves. It is not a fact that I went to Mr. O'Connell for the purpose of finding out whether or not he
63 had a method for preventing these boys from having to be called to the colors. If I understood it right. These boys wanted me to go to Mr. O'Connell about the testing of the constitutionality of the draft act.

At this point, in answer to questions asked by the Court, the witness testified: I- other words it might be the case that these boys did not want to go into service; that must have been the reason they wanted to test the draft. I could not tell because I did not know what they thought about the matter—no doubt that is what they represented to me. Mr. O'Connell stated something of the kind as to whether or not he could keep them from being compelled to bear arms, he answered the letter I wrote him saying the draft act was unconstitutional. I do not recall that Mr. O'Connell said what the situation of these boys could be or how they could be protected while the draft act was being tested.

Cross-examination.

By Mr. O'Connell:

"I never saw Mr. O'Connell at any time until I went to his office about August 1, 1917 and never in any conversation at any time and place was anything said upon the subject of obstructing the draft law or the operation of the draft law, or upon the subject of obstructing any enlistment or recruiting, or about not being registered, or inducing or persuading anybody not to register under the draft law, or upon the subject of not taking the physical examination under draft law or any other law, or about not responding to any call or any charge, or anything else done by the officers, or requested to be done under the draft law, or any other law, and never heard Mr. O'Connell say anything on any of those subjects. Mr. O'Connell never said anything to me except what I have previously told here. The piece of paper with the 23 names on it, read by Mr. Pres-
64 ton to the Jury, I never saw it in Mr. O'Connell's possession, and I cannot remember ever giving it to Mr. O'Connell or anything about it. I do not know of any slips or circular letters being sent throughout the country. I did not send any throughout the country, and do not know of any of the defendants doing so. I had some of the circular letters just shown me in my room. I might have brought some along with me to my study but I don't know positively. The suggestion that Mr. O'Connell come to Lodi was first made by the people in Lodi and I carried the message to

Mr. O'Connell and said to Mr. O'Connell that there were so many questions asked of me that I could not think of them all and the best way was to go up and let the public and everybody ask questions."

The United States Attorney then offered the said two circulars in evidence as one exhibit and they were marked U. S. Exhibit No. 2 (The original of said exhibit to be transmitted to the Supreme Court pursuant to stipulation). The United States Attorney then offered in evidence the articles of incorporation of the American Patriots and they were admitted and marked U. S. Exhibit No. 3. The original of said exhibit to be transmitted to the Supreme Court pursuant to stipulation.

"The first time I ever saw or communicated with the defendant David J. Smith was yesterday, September 12, 1917; the first time I ever saw the defendant Herman B. Smith was the night of that Dreamland Rink meeting at which Rev. Mr. Whittaker presided. The first time I saw the defendant Wacker was at that meeting. The first time I saw Dr. Hoffman was when I first came down to inquire about O'Connell and the patriots. I first went to the headquarters of the American Patriots and there found Dr. Hoffman which was the first time I ever saw or spoke to him. Mr. Hoffman seemed to know me through the correspondence with Mr. O'Connell and consequently he took me to Mr. O'Connell's office that
65 very day. The first time I saw or spoke to the defendant Carey was in the Court room the day after we were indicted. I never at any time had any talk with Wacker on the subjects of enlisting or recruiting, or registering under the draft law or any other law, or of physical examination under the draft law, or any other law, or about objecting or obstructing, or resisting or evading in any way the draft law or any other law. I was arrested and gave bail at the same time on the day after I was indicted. I never had any conversation with Mr. Carey on the draft law or any other law; all he stated to me was that he was a drafted man within a month of being over the age, this was in the middle of August and the first time I talked with him on any subject, and at no time did we ever say anything more on the subject of the draft law or enlistment or recruiting, and there was nothing said at any time about not reporting for examination or for registration or under the draft law. I never had any talk with any of the defendants at any time upon the subject of the draft law, or obstructing or evading or not reporting for examination or registration or anything of the kind.

This concluded the testimony of this witness and the United States Attorney offered in evidence as one exhibit three sets of slips containing applications to become members of the American Patriots signed with the name and address of the applicant, one set contained the names of those who had paid in full—120 names in all—another set contained the names of those who had partly paid, and another set contained the names of those who had not paid anything. To which offer the defendants objected on the grounds that they were immaterial, irrelevant, incompetent and the proper foundation had

not been laid in that there must first be proof of a conspiracy. The said objection was therefore overruled by the Court.

66 Mr. O'Connell: Will your Honor save an exception so that later on, I may make a motion to strike out.

Exception No. —.

The documents were thereupon admitted in evidence as United States Exhibit #4. (The original of said Exhibit to be transmitted to the Supreme Court pursuant to Stipulation).

The United States Attorney then offered in evidence a slide to be thrown on the screen in moving picture theatres being a picture of the signing of the Declaration of Independence with pictures of Daniel Webster and George Washington and requesting persons to join the American Patriots, alleging that Congress was violating the Constitution of the United States, (but the defendants then and there duly objected for the same reasons specified in the objections stated in the previous exception, but the Court overruled the objections and admitted the evidence.)

The United States Attorney then offered in evidence a list of the theatres and places where said list was shown (to which offer the defendants objected on the same grounds as to said previous offer of evidence, but the Court overruled the objection and admitted the evidence) and it was read to the jury and is in the words and figures following:

(*List of Theatres as Shown by Exhibit.*)

Irving Theatre	9th Ave. & Irving Sts.
Venus Theatre	2251 Market St.
Fa-ryland Theatre	Devisadero & Fell Sts.
Elite Theatre	Sacramento & Presido Sts.
Palm Theatre	6th Ave. & Clement Sts.
La Bonite Theatre	23rd & Bryant Sts.
Jose Theatre	2262 Market St.
Castro St. Theatre	18th & Castro Sts.

67

Mission Theatre	3374 Mission Sts.
Cortland Theatre	Cortland Ave & Elseworth Sts.
Panama Theatre	Brazil & Mission Sts.
Ingleodeon	Ingleside.
Ocean View Theatre	Ocean View.
Star Theatre	Bryant Theatre.
Synnyside Theatre	Sunnyside.

The United States Attorney then offered in evidence the minute book of the corporation, American Patriots, and it was marked U. S. Exhibit No. 6, and read to the jury (Said original Exhibit to be transmitted to the Supreme Court — to stipulation).

The United States Attorney offered in evidence a contract for the display of said slide in said theatres, and it was marked U. S. Ex-

hibit No. 7 (original to be transmitted to the Supreme Court pursuant to stipulation).

ALBERT J. MCCARTHY, a witness called for the United States, being first duly sworn, testified as follows:

Direct examination.

By Mr. Preston:

I am a police officer of the City and County of San Francisco, I recognize the photograph now shown me as the photograph of a wagon I locked up on August 6, 1917. I saw it circulating on the streets of San Francisco. I noticed it on Seventh Street right opposite the Post Office. The order came from the Chief office that night to lock up the driver and the wagon for disturbing the peace.

The United States Attorney then offered in evidence a photograph of the wagon and the inscriptions on the three sides of the wagon, reading: "John Bull is ruling and ruining us. What are you doing about it? Join the American Patriots, 714 Mechanics Building." The said photograph was thereupon marked U. S. Ex-
68 hibit No. 8 (original of said exhibit to be transmitted to the Supreme Court pursuant to stipulation).

JOHN MURPHY was sworn and testified as follows:

Direct examination,

By Mr. Preston:

I am 26 years of age, have taken out my first citizenship papers, and registered for the draft; was notified to appear for examination on Monday, August 6, 1917, receiving the notice the Wednesday before; met the defendant Carey on Thursday at McSweeney's saloon at 29th and Sanchez Streets, and asked him if he was notified to go before the physical examination board, he said yes but he did not think he would go. I told him I had the same notice, and he asked me if I was going and I said I did not know and he said, you come with me and I will fix you up; I went with him down to the Mechanics Building on Market street and joined the American Patriots; I did not talk to anybody. Carey just said he took me down to join the American Patriots and said he got another friend to join the organization and told me if I joined it would be all right, and I joined and paid $2.00 that day and got a receipt and the man who gave me the receipt did the talking on behalf of the Patriots; I went back a day or two afterwards, Saturday August 4, 1917, and paid the balance to the same man and got the following receipt; "August 4, 1917, Received from John Murphy six and no one hundredths dollars, entrance fees and dues for August and September 1917, American Patriots, incorporated, E. R. Hoffman, Treasurer, $6.00". On Thursday the first day, the man to whom I paid the money told me to go to Mr. O'Connell. I went to Mr. O'Connell's

office and gave him the notice I got from the board and never got it back. Mr. Carey went with me to Mr. O'Connell's office. I had no conversation with Mr. O'Connell and I forgot what he said. He gave me a paper to fill out my exemption and file that exemption claim".

69 The paper shown me is the paper I signed that day Daniel O'Connell gave it to me and told me to read it carefully and take it out to the physical examination board that same Saturday evening and leave it with the board and to be sure to go before them for the physical examination on Monday, that was all he said. When Monday came we did not go; he said to take the physical examination but not to sign any papers out there at that board; he never told me why; he did not say a word to me about an oath. I did not go Monday; I went down to see O'Connell Monday; he said he thought I did right not to go out there Monday; he thought I might get pulled in, that is all he said. I never had seen O'Connell prior to that Saturday I went to his office. I read the paper over but I didn't know what it meant; I was not trying to keep out of war, but I was thinking that paper might save me from going before the exemption board, but I didn't know whether it would or not. I thought the paper might keep me from being examined. Carey did not say how he would fix me up. I was never told what the American Patriots were. Mr. Carey took me down there and told me about it, to join them and it would be all right. Carey took me over and introduced — to Mr. O'Connell and then handed Mr. O'Connell my notification slip.

The United States Attorney then offered in evidence the said exemption claim signed by said witness, and it was read to the jury, and marked U. S. Exhibit No. 10 (Original of said Exhibit to be transmitted to the Supreme Court pursuant to stipulation).

The witness resumed his testimony as follows:

I read that paper but I did not understand it at all. I told Mr. O'Connell I had a father and mother in Ireland, partially depending upon me for support and to a certain extent that was true;

70 I send them $30.00 or $40.00 once in a while; it must be five or six months since I send them that all at once; Mr. O'Connell asked me about these facts before he put them on the paper: I am a single man.

Cross-examination.

By Mr. O'Connell:

I can read and write the English language and understand it when I read it. Once in a while I read the daily newspapers and understand them when I read them and know from reading them that the war was going on and that the United States was at war with Germany, but did not know that the draft act was passed, or, that it was before Congress. Mr. O'Connell told me to be sure and report for physical examination on Monday, but on Monday morning I saw my name in the paper about this exemption claim put in and I

got scared and did not go that morning. I was frightened from what I read in Monday morning's newspapers. I read it and understood it myself and that was the only reason I did not go to take the examination; when I talked with Mr. O'Connell at his office on Saturday, there were present Mr. Carey, Michael Donlan and myself, and there was a conversation going on among the four of us. I did not understand the conversation and don't remember anything of it. At this point the Court again interrupted and asked the following question and received the following answer: "Did they address anything to you or did they talk among themselves?" The witness resumed his testimony as follows: During the conversation, Mr. O'Connell was sitting at the desk and the three were sitting at one side of the desk. The next time I saw Mr. O'Connell was between 11 and 12 Monday forenoon when Carey and myself went into Mr. O'Connell's office. Mr. O'Connell said he thought it was better that we didn't go out there Monday morning to take the physical examination. Carey and I were not together all the morning. I met him about 7.30 at 29th and Sanchez Streets. I met him
71 again there at 9 or 10 o'clock and was with him until about 3 o'clock. When I met him in the morning we decided not to go to take the physical examination. I was to report at the examination board at 8 o'clock that morning and had plenty of time to go and be examined and get down to Mr. O'Connell's office between 11 and 12. When I came to Mr. O'Connell's office I gave him no information that I can think of. Mr. Carey told Mr. O'Connell we had not been to the Board. I can't remember anything that was said at Mr. O'Connell's office that Monday morning other than that he said he thought it was better that we didn't go out there that Monday morning. Saturday night about 4.30 o'clock I had made arrangements to meet Carey at Twenty-Ninth and Sanchez Streets, at 7.30 A. M. Monday to go and take the physical examination and Monday morning we decided not to go out there. Carey then said we better not go out as we might be pulled in, locked up; that was in consequence of what we read in the newspapers. I was sure that if I went out to the Board I would be locked up and that was the only reason I did not go out there. The next day, Tuesday, I saw that a warrant was sworn out for me and on Wednesday I went down and saw Mrs. Adams, the Assistant District Attorney, and explained the case to her and told — I was ready to take the physical examination and she told me to go and take the examination and I went and took the examination and the case against me was dismissed. Mr. O'Connell might have said to me that I should go up and have another day set and take the examination, but I don't remember it.

In answer to my question whether or not Mr. O'Connell thought they would have arrested me on Monday morning, Mr. O'Connell said I was right, that I would be arrested; that he thought we did the right thing not going out there that we might get arrested.
72 Up to the time I refused to go Mr. O'Connell's instructions to be sure and go were still good, and when I did not go and take the examination, whether for fear of being arrested or for any other reason I was violating Mr. O'Connell's instructions to me".

"The Court:

Q. Mr. O'Connell had told you to go and take the physical examination but not to sign any papers? A. That is what the gentleman told me." And that was prior to the Monday that you were to appear? A. Yes."

I don't know that Mr. O'Connell said why not to sign papers, or about being put in the military service, or that if we were in the military service we could not appeal to the civil courts, as the reason not to sign any papers that would put me in the military service; he may have said something. I don't know now what he said; if he did I cannot remember what he said; I did not understand what he was saying, during all the talk going on between Mr. Carey, Mr. Donlan and Mr. O'Connell while I was present, I don't remember of asking an explanation of anything, nor did I at any time say that I did not understand what they were saying or talking about. When I first came to Mr. O'Connell I told him that I was ready to fight for the United States any time but I was determined I would never fight for England; that was my determination then and so I told him repeatedly. I did not understand that at the time being whether it was to fight for England or the United States.

I never saw any of the defendants except Mr. O'Connell and Mr. Carey until I saw them in the Court-room at this trial. I never saw Mr. O'Connell before August 4, 1917, and have known Mr. Carey by eyesight for twelve months.

THOMAS MCGUIRE was sworn and testified as follows:

Direct examination.

By Mr. Preston:

73 "I am clerk of the local Board under the draft act for Division No. 4 of San Francisco, Cal.; and was present when John Murphy and Thomas Carey together presented claims for exemption, the O'Connell claims; (witness identified the claim presented by Carey and it was offered and admitted in evidence and marked U. S. Exhibit 19 and is in precisely the same words as that presented by Murphy). I read the paper over twice. I read the Murphy claim once; I asked them if they understood the meaning of the contents and they said no; they said they were told to take it out there and leave it. I asked them if they read it and they said no; I told them that under the law I could accept only the form of affidavit prescribed by the law and volunteered twice to give them any form of affidavit that would suit their case but they would not take it, and I told them a second time we would not take their claims, but Mr. Carey said "Well, I am going to leave it here." I told him I would not take it and he said, "Well, you can put it in the waste paper basket." I warned them to come back for the physical examination on Monday morning, August 6, and they both said they would be there.

Cross-examination.

By Mr. O'Connell:

There is no blank claim providing for such a claim of exemption such as Mr. Murphy and Mr. Carey filed; no form contemplated any objections such as they interposed.

They never came back. Yesterday September 12th, 1917, Mr. Carey in answer to a new notice from us for physical examination came and will be examined next Tuesday.

WILLIAM J. MOWRY duly sworn, on direct examination by Mr. Preston, testified:

I reside at Colma, San Mateo County, I am a Pharmacist residing and having an establishment in Colma, San Mateo County,
74 Cal., I know the defendant Hoffman, I am within the draft age, but not yet drafted. I had several conversations with defendant, Hoffman on the draft question. About a month and a half ago I had a conversation with him in which the question of e - emption affidavit was discussed with him.

To the question what was the conversation the defendants renewed the objections on the previous ground that it was immaterial, irrelevant, and incompetent and no foundation had been laid, and no conspiracy had been shown, and it was had in the absence of the other defendant, and upon the additional ground that it was an act and declaration after the conspiracy, if there was one, succeeded or failed, that is after the time for registration, and after the time for physical examination. Said objections were overruled by the Court.

To which ruling and decision the defendants then and there duly excepted and now designate it exception No. —.

Thereupon the said witness resumed his testimony as follows: Well, Dr. Hoffman came into the store and handed me a couple of membership blanks of the American Patriots and one of which blanks was put in evidence and marked U. S. Exhibit No. 11. Dr. Hoffman said "What do you think of them Bill, just sign one of them. Here sign this;" that was the whole conversation; I said "I will think it over. I don't think much of that. No, I don't care to sign it Doc." I took the paper but I threw it away later; later I saw Dr. Hoffman lots of times and would say "Well, Doc., how is it going along?" and he would answer, "Oh, it is coming along fine," or something in that respect. At one time, I said, "Well, I think that before you could prove that law unconstitutional, all the boys would be in France"; he said they wouldn't, they would bring
75 them over there, and when they would go to take them on the boat at New York, there would be an injunction or some other paper signed that would stop them, that would keep them out of it; that would prevent them from going."

Nothing was said about contributing money. He told me once it was $5.00 for the first and $1.00 a month after that; he said the

money was to be used to make the legal fight and for the advertising and expenses of the organization; he told me this when he first handed me papers to sign; in this injunction proposition I started in to talk with him in regard to it, and I said, "Well, Doc., this does not look to me to be plausible. I think you are being made a fool of with this thing, because I says I know you to be a fellow that when you believe anything you go it too strong." He says "Well, I will tell you Bill. I believe that this law is unconstitutional." I says, "even if it is, they are going to get you there before the law is proven unconstitutional," and he says "Why, we can get an injunction and that will hold the men here until it is proven; It has to be proven first. "He never said, how many cases they were going to start to test this law, or how many injunctions would be necessary, or whether there would be an injunction for each man."

The witness was shown a membership blank and identified as a copy of the one handed him by Dr. Hoffman, and it was admitted in evidence and marked U. S. Exhibit No. 11. (Original Exhibit to be transmitted to the Supreme Court pursuant to stipulation.)

Cross-examination.

By Mr. O'Connell:

The witness further testified as follows: "I have known Dr. Hoffman about 2½ years, he wanted me to join, but I did not join the American Patriots. My first conversation with him was the date these membership blanks were printed; the second conver-
76 sation was three or four days afterwards when we argued about the constitutionality of taking the men away. I only had these two conversations with him; Dr. Hoffman at no time solicited any one in my presence. He told me about another member in that community, J. P. Moresco, a drafted man who told me he had joined; Dr. Hoffman also told me that he solicited him and that he joined.

EDWIN S. PARKER was next sworn and testified on direct examination by Mr. Preston: I am a short-hand reporter in the District Attorney's office at Stockton. I reported a speech of Daniel O'Connell at Lodi, Cal., on Aug. 4, 1917; after the speech, I believe there was a collection taken and then he answered a number of questions, but I was not there at that time. The document shown me is a transcript of the stenographic report I made. (Said stenographic report was thereupon marked for identification as U. S. Exhibit A for identification.)

Cross-examination.

By Mr. O'Connell:

The witness resumed his testimony as follows: "I reported the speech under the direction and request of E. P. Foltz, District Attorney of San Joaquin County and I left immediately after the

speech. I heard Mr. O'Connell announce a request for questions and he would be glad to answer them, and the chairman also announced at the beginning of the meeting that Mr. O'Connell would answer questions.

JOSEPH I. SAVAGE was duly sworn and testified as follows:

Direct examination.

By Mr. Preston:

"I am the clerk of the Local Board No. 2, under the Draft Act and it meets at 1676 Newcomb Street, San Francisco, Cal., and on August 7, 1917, the defendants Wacher came before me as Secretary and said "Here is an exemption, I will be here at the appointed four in the morning to take my physical examination." That was all the conversation that day; he was examined twice."

77 A copy of the paper claim of exemption was put in evidence and marked U. S. Exhibit No. 12 (a copy of the original which was substituted in lieu of the original, to be transmitted to the Supreme Court pursuant to stipulation.)

Cross-examination.

By Mr. O'Connell:

"Wacher said that he would be there the next morning, and he called the next morning at the appointed hour, and on his first physical examination, was rejected. I ordered his arrest before his examination on August 7, the night before he was to be examined. The clerk of the Board ordered his arrest just as he arrived on the morning of August 8, 1917."

"The Court:

Q. What for?

A. For filing that exemption claim. That was the ground for his arrest. The board meets in the police station there; he was not booked at the station, but an officer took him away down to the Hall of Justice, and I could not say how long he was held there; he took the examination before they took him away. I saw the doctors talking with him and one doctor told him he was rejected on account of his eyes, and after he was rejected he was taken down to the Hall of Justice. Subsequently, we gave another notice of examination and he was examined three or four days later by another doctor and he was accepted; he never asked permission to withdraw this claim of exemption.

Miss FLORENCE KEARNS was duly sworn and testified as follows:

Direct examination.

By Mr. Preston:

I am a stenographer employed in the office of Don Rathbun, Special Agent of the Bureau of Investigation of the Department of Justice, Post Office Building and requested to make a stenographic transcript of the speeches of speakers at meetings of Mrs. Skeffington at Maple Hall in Oakland on July 2nd and July 5th, and another meeting on July 3rd, at Dreamland Rink at which
78 latter meeting the defendant, Herman B. Smith presided, and the principal speakers were Mr. Snyder of Oakland, Rev. Robert Whittaker, Thomas Mills, and Mrs. Anita Whitney; I saw a dodger that was on the street advertising that meeting; that is one of them."

Exception No. 4.

The United States Attorney then offered the dodger in evidence and offered to read it to the jury and the defendants objected that only the name of Herman B. Smith appeared on the dodger and that it was irrelevant and incompetent and no foundation laid, which objections were overruled by the Court, to which ruling defendants duly excepted and now designate same as Exception No. 4. The dodger was thereupon read in evidence and is as follows:

"Eternal vigilance is the price of liberty. Americans wake up, defend your liberties at home. Attend the Declaration of Independence mass meeting, Dreamland Rink, Steiner Street between Sutter and Post. July 3, 1917, 8 P. M. (Eve of Birth of our Liberty). "Sara Bard Field, Atty. Daniel Yost, Rev. Robert Whittaker, Theodora Pollak, Ferdinand Claudius, J. E. Snyder, Anita Whitney, Rev. Wm. Short, William McDevitt, Walter Thomas Mills, and other prominent speakers. Also young men of conscription age. Herman B. Smith, chairman. Admission Free. Doors open at 7:30 P. M."

The witness resumed her testimony as follows:

"I did not see the defendant O'Connell at the meeting or any of the other defendants except Herman B. Smith, who presided, and I made notes of nearly all of his remarks and of practically all of the speakers. Mr. Snyder of Oakland spoke first and Mr. Smith made a few remarks after each speech. This is a correct transcript of what Mr. Smith said with the exception of a few sentences I did not get, which are indicated by the stars at two places."

79 Exception No. 5.

The transcript thus produced was offered in evidence by the United States Attorney and objected to by the defendants on the same grounds as the objections to the previous evidence as set forth in the

previous exceptions. But the Court overruled the objections, admitted it in evidence, and it was read to the jury and marked U. S. Exhibit No. 14. (Original to be transmitted to Supreme Court pursuant to stipulation.) To all of which the defendants duly excepted and the exception is designated as Exception No. —.

Said transcript is in the following words and figures:

"Now, friends, this is the eve of American democracy. On this day was born the first nation that had liberty for its foundation principle. A brave people have assembled here to-night; certainly they have been brave to come out here after the threats that have been made against this meeting. There would have been an overflow, except for that, I am quite certain, but those people who are here show the same spirit that moved those men that established this government in *1766*.

Now, as a young man, I ask the question: "What about the conscientious objector?" We want to know about him. He, too, has the right of all those people here and in this nation, and has a conscience that dictates. When the President called for 70,000 volunteers, he got less than 10,000. No, the people do not want this war. When the people went to the ballot box on Registration Day, when the young men went there on June 5th, they said they did not want to go to Europe and die, and 68% of those boys claimed exemption. The government report states that 15% did not register. Of the 32% which did register, we know most of them had diseases that they did not state publicly, so that they did not claim exemption because they would have been exempted anyhow. So that makes it about 10% to 15% of the people of military age in this county that really
80 voted to go to Europe and some of these people were afraid to say they would not go to Europe because of sneers—the sneers that never would come because the people did not want this war. On September 1st we are going to have a big lottery in this country. They are going to see which ones of us go over there first to be slaughtered. Now, there are a lot of boys who do not want to go. They think it is murder—they do not know why they should be compelled to go and die "somewhere in France." They would undoubtedly be willing to die in America, or to go and take part in the wars of this country. Now these boys, friends, are going to demand that we stand by them. Every one of us here who are above the age must do a share in aiding these boys to stand firm in his conscience, and say he will not go.

President Wilson so far has not announced what he is going to do about the conscientious objector. He has only told us about the registration. These boys are going to say to you: "What are we going to do?" As fathers, mothers, brothers and sisters are we going to be enabled to say: "We do not want you to go." There is an organization throughout the whole nation to see that their fight is taken care of; we want you to *k*elp; we have started one in San Francisco here and there are others being started, and we want you to give us your assistance, and we are telling you we must have money. The government has asked you to buy Liberty bonds, finance the

war and give and equip our boys to be maimed and killed. But we want to save our boys at home, to save them from going to that hell in Europe. Let us stay here and help them. Any money that you pay here tonight, after defraying the expenses of this meeting, will go to save our boys."

The cross-examination.

By Mr. O'Connell:

There were some things left out; I didn't catch them. The speaker would turn his head perhaps, and I could not catch the words. My instructions were to take what I could get ac-
81 curately what I could hear. I took down what Mr. Smith said at the opening of the meeting, reading a petition to Congress. I don't remember that he used the expression "All that is said here this evening must be addressed to this petition to Congress." I don't remember that particular thing.

I got the petition to Congress; it is as follows: Petition to the Congress of the United States of America. To the Honorable Congress. Several thousands of Citizens in San Francisco, in the United States, in Dreamland Rink, in San Francisco, on the eve of the one hundred and forty-third anniversary of the Declaration of Independence, July 3, 1917, in order to secure a redress of grievances petition your Honorable Body:

First. To prohibit by law the use of our land and naval force for the purpose of conquest and to authorize their use only for the purpose of common defense as provided in the Constitution of the United States.

Second. To submit to a referendum of the nation a repeal of the present Draft Law.

Third. To authorize the issue of no more bonds for war purposes, but insist hereafter to provide for all war expenses by the appropriation for that purpose of all incomes in excess of $10,000 per year.

Fourth. To hasten the end of this war by declaring by Act of Congress:

1st. Just what can take place before this nation will ask for peace, and that this Declaration shall protect the liberty and independence of the smaller nations, as Belgium, Finland, Poland, Ireland, Cuba, Mexico and the Philippines, and under conditions as related to any other nation that shall apply in like terms to all other nations.

82 Fifth. To nationalize all the great private manufacturers now engaged in lumber, manufacturing, and banking, and to carry on these industries at the cost of the service rendered; to deal with the workers through their own governing bodies and their own organizations and establish"—there is something I missed there, a word or two, but it was to grant universal suffrage and initiative and referendum as they now appear in the State of California. That was all. Then he said, "I wish you to bear in mind at the close of the meeting that we take a vote upon it before we call upon

the next speakers." I glanced over my minutes and did not find anything about Mr. Smith saying that all speakers must address their remarks to this petition. I didn't hear Mr. Smith make any such remark. I believe there was a standing vote and the petition was adopted. That is all I recollect on those three points. When the meeting opened and Mr. Smith saw me there, he invited me to come up on the platform so I could make my report better, but I did not accept the invitation.

Cross-examination.

By Mr. O'Connell:

The witness then resumed her testimony as follows: About a month afterwards I reported a Labor Meeting at Dreamland Rink at which Mr. O'Connell made a speech; the principal speakers being—three I. W. W.'s from Arizona and Mr. Walter Thomas Mills; Mr. O'Connell made a very few remarks, he simply said that he was giving up his time to these I. W. W. people in order that they might tell their story; I saw the dodgers that announced the meeting; that is one of them. (Its language is as follows:—)

"American Patriots' address by Walter Thomas Mills, on 'Shall there be money for War and None for Wages'; address by Daniel O'Connell on "True American Patriotism." Grand Mass Meeting Dreamland Rink 8 p. m. Tuesday, August 21st. Admission Free. Everybody invited. Attend yourself and bring your friends. The people must now save themselves and their liberties by as-
83 sembling at these Mass Meetings and asserting their constitutional rights. It is your personal duty to attend this Mass Meeting. We will look for you there."

The dodger was then admitted in evidence, read to the jury and marked U. S. Exhibit No. 15 (Original to be transmitted to Supreme Court in pursuance of stipulation).

The witness resumed her testimony as follows: "I know the people were I. W. W.'s because they were introduced as I. W. W.'s, deported from Arizona. Mr. O'Connell said these three persons had come up from Arizona and asked permission to tell their story to the people of San Francisco at that meeting, and therefore, that he would give way and let them use his time in telling their story.

S. B. BANKSON was duly sworn and testified as follows:

"I am the proprietor of Hotel Fresno, 44 Eddy Street and know the defendant David J. Smith and have known him since May, 1917, when I met him at the Jack London Library and seen him in Socialists' meetings. I saw him at my hotel about June 2, 1917, between 7 and 8 P. M. when I had a short conversation with him about some socialists' platforms on June 2, or two days before the draft registration. The conversation between myself and David Smith was that Mr. Smith said he was going to a social and probably would not be back that night. I told him that the package could stay in

the next room, but the next following day would be charged for the next following night. He said it was not necessary because the Socialist platform was to be distributed at the Auditorium. He had some package in his room, which I believe was room 108, which he had engaged for that Saturday night, June 2nd; and I told him if he kept his package in that room any longer he would be charged for it another night, and he said that would not be necessary, as the package contained Socialist platforms that would be dis-
84 tributed the next Sunday night. I told him to bring the package down to the office, to the check room. I took it over myself because it was very heavy and put it in the room opposite, in the sewing room. Mr. Smith was present about that time, when I took it and put it in the sewing room. He told me that the package contained platforms of the Socialist party, to be distributed in the Moose Auditorium the following night, Sunday night, which place is right around the corner from us; and that is why he brought them up there. I said I was going up to the country early in the morning. I forgot to tell the clerk they were in that room; when Smith and the boys came around for their package, they could not find it. I believe Smith was present when I put it in the sewing room, but I would not swear to it. I have seen pamphlets of that description; there was a hand-grip and a suit case; one was opened and set up on a table and on trunks and various effects belonging to other people. I could not say what the pamphlet was or even what the title was; I did not read it. I saw cards advertising the meeting at Moose Hall, they were a red card of the color of U. S. Exhibit No. 13. Walter Thomas Mills was one of the speakers advertised, but I could not say who was advertised as the presiding officer. I was not in the City and did not attend the meeting. I heard on Wednesday afterwards that Mr. Preston had ordered the pamphlets brought down to his office. I have seen Mr. Smith and several of the defendants several times since. I know Herman B. Smith, and heard him speak at the Jack London Library, 1256 Market Street. That was the Socialists' headquarters at the time this stuff was brought to my place. Mr. Smith brought it there because of the closeness of the hotel to the Auditorium, right around the corner, that was the only reason that he said he did not let the stuff stay at the Socialists' headquarters.

85 I heard nothing from the Socialists' headquarters with reference to the contents of these two grips except that Mrs. Symes and Mr. Hampton were interested in it. Mrs. Symes was the Secretary of the party at that time. I am a member of the Socialist party. The pamphlet known as Document No. 5 came direct from Chicago to the majority of the voters throughout the country belonging to the Socialist party. It is the majority report of the Socialists' platform. I could not say what this leaflet contained because I did not read it.

Cross-examined.

By David J. Smith:

I am aware that the Socialist party is a legally constituted political party in the United States and places candidates upon ticket, and have regular platforms of political action. During the meeting prior to the one at Moose Auditorium I heard that these platforms were to be distributed during this next meeting on that Sunday night.

DON RATHBUN was duly sworn and testified as follows:

Direct examination.

By Mr. Preston:

"I am the Special Agent of the Department of Justice, located in this City, working under the Bureau of Investigation, and went over to the Hotel Fresno on Eddy Street for the purpose of taking charge of some documents and papers in the laundry room early in June, and found Mrs. Lillian B. Symes, Secretary of the Socialists' party and a clerk of the hotel there. I took away the contents of the two grips, which contents are here in the basket before you, and returned the two grips to the headquarters of the Socialists' party. It is my recollection that I was told at the time that there were 5000 leaflets in the package. One of said leaflets in evidence was thereupon offered and read in evidence by the prosecution and marked United States Exhibit No. 16 (original to be transmitted to Supreme Court in pursuance of *speculation*).

86 Witness thereafter further testified as follows:

Cross-examination.

By Herman B. Smith:

"I am not in the Secret Service of the United States; I am Special Agent of the Department of Justice. I went to the Hotel Fresno to get these pamphlets, when I received information that there were some documents up there that would be of interest, and those are what I found. I met Mrs. Symes there who said she came over for the purpose of getting the documents herself. She said they were the pamphlets which the socialist party intended to distribute. *The* said they were the same pamphlets mentioned in Moose Hall. I don't think I ever saw any pamphlet of that kind until I found those at the hotel. I looked the pamphlet over but did not attempt to decide what its character was. Mrs. Symes said she had an interest in it; I do not remember whether she claimed it as her property or that she had absolute control of it. I took them to my office and Mrs. Symes came up to my office and we had a talk about the pamphlets. Mrs. Symes came to the office of the District Attorney and demanded the return of these pamphlets as belonging to the Socialist party. Mrs. Symes said practically that she had sent the pamphlets over to

the hotel so that they would not be found, and for the purpose of avoiding the Government agents, in order that the people might distribute them without the Governmental interference, at the Moose Auditorium meeting, and they were to be hidden until they could be distributed. They were seized by me the second day after the Moose Auditorium meeting. I did not have any search warrant when I went to the Hotel Fresno and I seized the property and took it along with me without any search warrant.

87 MATTIE M. BARKLEY was duly sworn and testified as follows:

Direct examination.

By Mr. Preston:

"I am a stenographer at 565 Pacific Building, in the same building where Daniel O'Connell has his office. I have been doing the work for the American Patriots from the time it was organized up to about a month ago. I typed the Articles of Incorporation, also Government Exhibit No. 10, the John Murphy claim of exemption at Mr. O'Connell's request. I could not say how many copies I typed. I mimeographed quite a few hundred. I didn't do all the work myself; different ones in the office did it, but Mr. O'Connell did not accept the work. I could not say how many copies I did turn over to him. I was paid by the month by Mr. O'Connell, and he was in and out of my office a good deal. Mr. O'Connell ordered 100 for Lodi, but I did not get them out in time. I got them out afterwards, but he would not accept them. I typed copies of the legal opinion Exhibit No. 1, but I did that for Mr. Yost who has an office adjoining Mr. O'Connell, having the same entrance room. I made a few copies and gave them to Mr. Yost. I was present at the time Mr. O'Connell was giving out these exemption claims. I was there frequently. I did most of my work in Mr. O'Connell's office, he dictated it to me on the typewriter machine. I preserved no copies of what I did. When Mr. O'Connell handed copies of the exemption claims to parties, he would tell them about signing. I could not say the exact words, but one time I heard him tell them not to be afraid, that if they got mixed up, to telephone him and he would come down and take care of them at this exemption board. I heard him tell one once not to let them bulldoze him into signing them, or whatever they were supposed to do with them. I mean signing those I had mimeographed. He said they did not have to sign
88 papers; that they should not sign. I don't know what he did say about taking an oath. He said when they took an oath they were liable, and that they should not take the oath. He said in certain cases to sign the papers down there and in certain cases not to sign them. I don't know whether he meant these exemption claims or other papers or what he meant. When I was in the office there were a lot of things I heard but I was not bothering about them. Mr. O'Connell told them if they signed a certain paper, they would be liable to the draft.

He told them not to sign certain papers, whatever they were. Not the papers he prepared in his own office—I don't know. To sign the papers he had prepared for them, the exemption claims whatever they were, to sign those but not any others. That is what I understood, papers at the exemption board. That is the way I understood it. He said about bulldozing them, if they tried to bulldoze them into signing the papers to telephone him; not to let anybody bulldoze them into signing the papers; he said if they were weakening or being bulldozed, to telephone him. He put his hand on their shoulders when they were leaving, just a confidential tap or pat.

Young men were coming and going all day to Mr. O'Connell's office just before the draft came and after it came up. I don't know when the draft was supposed to come up. I don't know how many days they were coming and going; They just came up there.

I filled in a lot of these exemption claims, but I don't remember the names of any. I remember the name of McCullough; I don't remember the name of Carey. I frequently filled in the blanks myself on the typewriter. The business was usually conducted in the reception room of Mr. O'Connell's offices. I saw some of the defendants around there; I saw Dr. Hoffman there often. He was Secretary and Treasurer, I think, of the American Patriots. I have seen defendant Wacker, I don't know whether he was connected
89 with the American Patriots or not. I did not see Mr. Carey or the two Smith boys. I got out notices for meetings of the American Patriots. I got out that notice.

At this point this notice was admitted in evidence and read to the jury and marked U. S. Exhibit No. 17 (Original to be transmitted to Supreme Court pursuant to stipulation.)

I do not know whether I got out such notices for more than one meeting. I wrote letters for them but cannot recall any of the names — whom they were addressed. I have drafted forms of petitions for the American Patriots, to be used to take subscriptions. I gave some of them to Mr. Hoffman. I made them out for Mr. O'Connell. They read: "We, the undersigned subscribe our names for so much money, the amount of money opposite our names." I think the name of American Patriot was used in the petition. I saw names on them once or twice when Dr. Hoffman brought them in. They called on me for more petitions. I made a petition for Mr. Yost to subscribe money for Leonhauser. I have written out letters for Mr. O'Connell, asking for help, assistance, but they were so mechanical that I don't remember anything, or any of the purposes stated in the letters. I had nothing to do with mailing out any of the literature, or stamping or addressing the envelopes. I just mimeographed the work. I was not in Mr. O'Connell's office all the time, I simply did the extra work. His work was mostly the American Patriots work; circular work, both petitions, exemptions blanks and letters. I was in and out all hours of the day. As a rule I did work at his office, by appointment or he sent for me, either Mr. O'Connell or any of the others up there at his office. Mr. O'Connell, Dr. Hoffman and

Mr. Wacher were talking to people at the office, but I don't know what they were talking about. Mr. O'Connell said if they signed any papers before the board they left themselves liable, that is the way I understood it. I don't remember him saying anything
90 about whether these young men would be in the service or out of the service while they were taking a test case to the United States Supreme Court. My work is so mechanical that I don't remember things I do write. I drew up demurrers and papers of that kind in cases where Mr. O'Connell was representing cases in court here. Mr. O'Connell, mostly, where I heard, gave directions and advice that they should sign no papers, take no oath in the manner which I have described heretofore, but he did not always put his hand gently on the back of these young men. He talked nicely and sweetly to them, but I never heard Mr. O'Connell talk any other way than nicely and sweetly.

Cross-examination.

By Mr. O'Connell:

He always tried to be sociable and amiable; that has always been his attitude. All my work in Mr. O'Connell's office was done in the outer office on the typewriter while Mr. O'Connell walked the floor and dictated it. There was no secrecy at all about it as far as the typing was concernd. I could not tell whether Mr. O'Connell brought the first claim of exemption down to my office. He did say that if he was going to have many of them it would be cheaper and easier and better to have them mimeographed after the first 100. I think that was the way it was. I wrote out six at a time on the typewriter I think, and the document consisted of three sheets. After that it was suggested that it could be done quicker and easier on the mimeograph. I don't know how many I copied, but it was suggested that if there — going to be more than one hundred it would be cheaper and easier to mimeograph them after the first one hundred, but after I get the form fixed on the mimeograph for one hundred it is cheaper to have it done in that way. It was suggested that it was almost as cheap to get out 500 as it was 100 on the mimeograph. Mr. O'Connel- wanted these things finished at a certain time, and they were not done. I was not there when he came in; the job was incomplete and Mr. O'Connell said he could not wait on me;
91 that it was better and cheaper to have them printed. He said he had to have them typewritten to send them to Lodi; he said he had to have 100 for Lodi and I was to do the 100. I did the 100, but Mr. O'Connell would not accept them; he said he could not use them because he had to have them at a certain time. I did not have them on time and he could not use them. I don't know how many were printed afterwards. In talking with the people in the office, whoever they were, it was in the outer office and there was no secrecy about it so far as anyone there was concerned. I cannot remember the names of any one I heard him talking to. I could not tell what I heard about Mr. McCullough or what Mr. McCul-

lough said or was said to him. Just as men were going out of the office, I saw Mr. O'Connell put his hand on one of the fellow's back, saying, "Don't let them bulldoze you into signing these papers," "Don't let them bulldoze you into signing any papers, and if you weaken, telephone me and I will come down and help you."

I don't know if I heard anything else; I don't even remember when it was said; I don't remember what was said before or afterwards, or anything else that was said.

Mr. Preston met me by appointment; his assistant, Mr. Ornbaum made the appointment and came and told me Mr. Preston wanted to see me, so I went to Mr. Ornbaum's office and met Mr. Preston there. Mr. Ornbaum talked to me first about the case. I don't know how the expression "don't be bulldozed," or "don't be weakened," or what it was, arose, or how the conversation came about. I can't tell anything about it. I heard so much on the subject, about the people, that they would be arrested for presenting the O'Connell claims, and that everybody was being arrested who presented the O'Connell claim

92 to the Exemption Board, that I don't remember just what they said upon that subject, but there was something said about being arrested if they presented the O'Connell claim of exemption. Mr. O'Connell said "They have no right to arrest you for presenting this claim, you have a right to present this claim." They said to Mr. O'Connell, "Suppose they do start to arrest me, or won't take the claim, what will I do," Mr. O'Connell said "Leave the claim with them and if they arrest you, phone me." Yes, that was said in the conversation. Mr. O'Connell said if they wanted them to sign some other papers "Don't let them bulldoze you into it." I don't remember the man's name whom I saw Mr. O'Connell put his hand on his shoulder as he was going out.

To different men, I think. They all talked friendly and familiarly with Mr. O'Connell when they came into his office. I was not surprised at Mr. O'Connell at the time putting his hand on their shoulders as I have testified.

I cannot tell what led up to the expression that Mr. O'Connell made, telling them not to sign any papers or not to take any oath at the exemption board, but I think Mr. O'Connell said in substance, "If you want to test the constitutionality of this law you must do it in the civil courts; if you get into the military service you are subject to the military courts and cannot test the constitutionality of it there; now if you want to test it in the civil courts, you cannot take the oath or sign any papers that would put you into the military service, so don't do anything that would put you into the military service." I was never a member of the American Patriots, and never was a member of any organization that Mr. O'Connell was a member of. I did separate work for the American Patriots, and rendered separate bills which they paid. I have been doing work

93 on and off for several years for Mr. O'Connell, and for various organizations with which he is connected, but I cannot tell what was done for each. I would not state positively that *that* I ever prepared for Mr. O'Connell a petition for assistance so

far as the American Patriots was concerned, but I think I did, but could not tell when, but it was Mr. Hoffman who took the petitions out; I cannot say who brought it to me. I could not tell now of Mr. O'Connell ever bringing down to me any petition, and I don't know that I have any recollection of his ever dictating a petition to me in his office. The Leonhauser petition was entirely for Mr. Yost; I cannot say that I did any work for Dr. Hoffman more than once. I have the exemption blanks that Mr. O'Connell refused to take; I have no copies of anything else. At this point the list of 23 names offered in the testimony of Mr. William Mengendoth, was marked U. S. Exhibit 18 (Original to be transmitted to Sup. Ct., etc.).

ASHLEY TURNER being duly sworn testified as follows:

Direct examination.

By Mr. Preston:

"I am a newspaper reporter at the present on the "San Francisco Chronicle," but on August 4th, 1917, was city editor of the Stockton "Mail"; Stockton is about 20 miles from Lodi in the same county, and on August 4th, I attended a meeting in Lodi, at which Daniel O'Connell made an address, and I heard the questions propounded to him and the answers he gave at the conclusion of the meeting after he made the address. I did not make any notes, other than notes in my mind. I didn't take down the language, because at that time I was not going out covering very many stories, and I have a good memory, and just took short notes to guide me, but did not take down the exact language. The subject of the questions propounded and the answers given by Mr. O'Connell which I heard were as follows:

94 One of the questions asked by a man who stood up in the middle of the hall, I think he had it wri'ten out, he said, "Now, Mr. O'Connell, in case we go to the exemption board, what shall we do; shall we refuse to take the examination?" He said, "No, I would not advise you to refuse to take the examination, but refuse to take the oath." He explained that by saying that as long as they took no oath, they would not be under the jurisdiction of the military authorities, and prosecution that might follow if they took no federal oath would be a civil prosecution. Later another man asked: "What would you advise us to do in case we go there to be examined and refuse to take the oath and they arrest us?" Mr. O'Connell's reply was, I am not positive that the word "Jail" was used, but he said they would be under the civil law jurisdiction and the merits of their case would have to be tried out individually, and that — new congress would be elected soon and that a new congress would be overwhelmingly against the draft law, which would be repealed, and his advice to them was to refuse to take any oath but to consent to an examination.

Q. What did he say about signing any papers, if anything?
A. He said to sign no paper whatever.

Q. What other questions?
A. A number of questions as to "how long it would take you to get out of town", and so forth, and "Where is your American flag?" One question was "Who do you want to win the war? And Mr. O'Connell, after a moment, said "I don't want any body to win the war," and he stamped his foot, and said, "I want it stopped".

The witness further testified as follows: During his speech he said the men who left the United States for Europe would not return; he said the average life of a soldier in the trenches was 48 hours.

95 As near as I can remember from this transcript of the stenographic notes of his speech, as near as I can remember, — were just about as follows: "Every intelligent person here knows that these young fellows who go across the ocean will never come back. We know that the average life in the trenches is about 48 hours. I wonder if it is 48 hours with those machine guns on both sides throwing bullets so fast that when a man throws up his head he is gone, and when they stick up their bodies to run across "No man's land" to the other trenches, you wonder how they even last 48 hours in the trenches. Every one of these young men who go will never come back—there may be some who may, but we don't know". He did mention a large number of test cases he was going to start; he did not state how many. As I understood it, it was a number of cases and he would bring them up individually and collectively, each case would be a separate one. Someone in the back of the hall said, "By the time that gets to the Supreme Court the war will be over," or words to that effect. Mr. O'Connell said "I have more confidence in the Supreme Court brother, than you have," which caused a little laugh. I think three or four months were mentioned as the time it would take this case to — the Supreme Court. Mr. O'Connell said in his speech that it would cost about $5,000.00 to take it to the Supreme Court, provided he got nothing for his services. In my own mind I am positive that he said that the worst that would happen to a man ordered into the service before he got through with his test case would be that he would stay in jail until it was decided or be out on bond, but that the new congress would be elected soon and it would repeal the draft act, which he claimed was unconstitutional.

96

Cross-examination.

By Mr. O'Connell:

I had a talk with Mr. Dolly; I wrote the report that appeared in the Stockton Mail the next day. Mr. Dolly was one of the secret service men from San Francisco. I wrote the headline of the item that appeared in the Stockton Mail about the meeting on that Saturday, August 4th, before it was held. Something was said at the meeting about the writ of habeas corpus. Somebody asked the question, suppose a man goes to take the examination and he is seized by the military authorities, how is he going to get out? Mr. O'Connell said that he must appeal to the court for a writ of habeas corpus, and have the legality of his seizure tested in court; and that

if they took the oath that put them in as a member of the military or navel service, that they were subject to military law and not to civil law, and could not apply for writ of habeas corpus, and for that reason, if they wanted to remain under the civil law, they must not take the oath. Mr. O'Connell spoke of it as not a war of defense, and that the constitution did not allow them to take soldiers out of the country. Mr. O'Connell asked the man who spoke about winning the war, what he meant by winning the war, and Mr. O'Connell said that he did not see how anybody won, that there never was a good war, and never was a bad peace, and if they went on and piled up all of our young men dead, he didn't consider that winning. The tenor of the question of the man who asked about the delay of the Supreme Court was that it would involve such delay that these fellows would be taken over there and would be fighting before the case got to the Supreme Court, and Mr. O'Connell answered, "Brother, I have more confidence in the Supreme Court than you have". The question implied that it would take
97 it so long to get *it* through the Supreme Court that they would be over there in Europe before the case was decided, or before it got to the Supreme Court. When it was said about a large number of cases Mr. O'Connell said that the question was being raised all over the country, in New York and other places, and that those would all go to Washington, and probably would be argued together by the best counsel in the United States, who said that this law was unconstitutional, and that they were confident of having the Supreme Court so decide. Hannis Taylor, former ambassador to Spain, and an author on constitutional law was mentioned, and Daniel Webster several times too.

ADAM METTLER was duly sworn and testified as follows:

Direct examination.

By Mr. Preston:

"I am 25 years of age; I know John Lockemeyer and Sam Lockemeyer and H. G. Mettler, William H. Louis, William F. Daniel F. Manuel, Harry F., and August F. Mettler; they live around Lodi, some of them are relatives of mine; some of them are over the draft age: Fred Cushman, Henry Cushman, the Two Handel boys, Daniel Wenlan and William Snobell. I am within the draft age; was called before the exemption board at Stockton; did not claim exemption. I took a paper to the Board when I went before it, I got the paper from a man named Wock. I joined the American Patriots and paid $5.00 to Bill Mettler; I saw Mr. O'Connell at his office prior to my going before the board; he gave me no advice that day. I was at the Lodi meeting, and also in Mr. O'Connell's room at the hotel, and on the platform after the meeting. I paid my money before the meeting. Mr. O'Conneli in my presence said, I should not take any oath if I wanted the law tested, he said not to sign any papers that would put me in the military service. When I went to the exemption board, I refused to sign papers at first; I did not

98 refuse to be examined. I said "I want these papers for a little while to examine it, and see what it is, and I will bring it back in a little while, "but they wouldn't give it to me. Then a young fellow said "Come along," and I went along and was put in jail. They did not take me to the telephone at first; I stayed in jail 26 hours; Christman was with me. Then I found out that paper was not the oath and went out and signed it, and was released and have been free ever since. At his room in the hotel Mr. O'Connell just asked me questions about who the various persons at the meeting were. I cannot remember anything he said before the meeting. I applauded his speech and heard distinctly everything he said. It was in his speech from the platform that I heard about not signing papers or taking any oath. He said if we wanted to test the law we had better not take the oath, and about signing papers. I acted on this advice when I went before the board. When I joined the American Patriots, the good I thought it would be for me was to find out whether this was constitutional or not. I guess nobody would know where we would be in the meantime while we were finding out whether it was constitutional or not. The way I understood it, it kept me out of the war.

Cross-examination.

By Mr. O'Connell:

If I would not take any oath, they would have me arrested and they would have to leave me out on bonds until the law was tested, or something like that; that is the way I understood it in the speech; it was to go to the Suureme Court of the United States to be tested. Mr. O'Connell said the Court was in vacation until October, and with the other cases before it, we would not get a decision in this case until about January or February from the Supreme Court of the United States, on account of the other cases before it. That is what I understood about keeping me out of jail until the case was decided, and if the law was unconstitutional that would change things. Mr.
99 O'Connell told me to go and take the examination; I had already registered. He told everybody up there at Lodi to take the examination, and to follow every legal step, to take the legal course. That was on Saturday night when the speech was made; the next Monday morning I was to go to Stockton to be examined; when they presented the paper to me at the examination board and wanted me to sign it, I told them I did not like to sign until I found out what it was and asked permission to show it to my counsel or some lawyer. They immediately took me and locked me up, and kept me in jail. Afterwards I requested somebody to phone to Mr. O'Connell from Stockton, and Mr. O'Connell phoned back and told me to sign the paper and I immediately signed it, and they set me free. I took the examination after signing the paper. I was ready to take the examination before, and went from Lodi to Stockton for that sole purpose on that Monday morning.

Redirect examination.

By Mr. Preston:

I did not file an O'Connell exemption claim or show any to the Board; they arrested me in a couple of minutes. (I had it in my pocket.)

HENRY CHRISTMAN being duly sworn testified as follows:

Direct examination.

By Mr. Preston:

I am one of the Lodi boys and I joined the American Patriots. I heard the United States Attorney read the list of names in the U. S. Exhibit No. 18. They did not all join at the same time. I paid no money then, but when I came to the office in San Francisco with Adam Mettler and Billy Snobell and Bill Mettler, I think August Mettler too, there were five of us and we paid. Mr. Mendedoth was not present. I never got any papers from Mr. O'Connell's office to take home with me. I did not see Mr. O'Connell at the office of the American Patriots in the Mechanics Building; I saw Dr.
100 Hoffman there and paid money to him and got a receipt for $5.00, said receipt which was admitted in the handwriting of the defendant Hoffman was thereupon read in evidence as follows:

He gave me no other papers at that time, and gave me no advice, but told me to go down to see Mr. O'Connell in his office, and all of us went to Mr. O'Connell's office; we talked with him about coming up and making a speech at Lodi because there was a number of boys up there and he would tell us how everything would be. Bill Snobell and Mettler did the talking. They said they would like to have him come up and speak at Lodi about the American Patriots, and explain*ing* what it was about. Mr. O'Connell said nothing to me about the American Patriots, except that if we wanted to test the law, he would help. I wanted the law tested; I did not think the war was right and I didn't want to go to war. I could not say that Mr. O'Connell said that he would keep us out of the war, but he said if it is unconstitutional, there will be no danger of us going into war. I guess he told us how long it would take to get the case to the Supreme Court, but I cannot remember how long he said it would be. He told us we might be in jail while the test was being made in the courts. I think I would rather go to jail than go to war. Mr. O'Connell said nothing about that. I heard a speech in Lodi and was in his room before the speech was made. Mr. O'Connell in my presence, before we went before the exemption board, told us in his office, that if we wanted to test the law, we should not take the oath, and we could take our physical examination, but that we should know what we are signing and not sign anything that puts us in the military service. He said the
101 reason why it was best to take the physical examination was that we might not be fit to go and that we would be all over the thing if we were not fit. He did not say that we would not have

to go to jail; he said that we should sign every paper that would not put us in the service. I had one of the so-called O'Connell exemption claims before I went to Stockton; Mr. O'Connell did not give it to me; Wock gave it to me and it was the first time I ever met him. Mr. O'Connell gave them to him to write up. I went to this man's house, he having told me after the speech that he had one to copy at his house. I went before the board at Stockton with Mettler; we came in to take our physical examination, and when we came up they gave us a paper filled out; I can't read very much and didn't know what it meant; they said "Sit down and sign"; I said I would not sign until I found out what it was. I said "I will take the paper and find out what it is, and then I will sign it." He said "No, you can't do that." He said, "What do you want with the paper?" I said, "I want to have it explained to me." He said, "I can explain it to you." I wanted somebody else to explain it to me, but he would not give me the paper. I was going to file the paper I got from Wock, the O'Connell exemption claim after I found out whether I was fit to go or not from the physical examination. No one told me, but I knew that myself, not to present it until after the physical examination. I was just about managing my own case. I Understood the paper I got from Wock was a claim of exemption, and if they found me fit on the physical examination I was going to file it with the board, and if I was not fit, I was not going to file it. I don't know that I was told to do that, but I never saw any use of filing it until after the physical examination.

102 I was taken to jail and kept there around 27 hours, and then my friend, John Lockemeyer came in and we told him to find out from Mr. O'Connell whether signing that paper would hurt or not, and he came back and told us that the paper would not hurt, and we signed it. I was not willing to trust the exemption officer or the district attorney of San Joaquin County, or the sheriff; I would have taken the advice of anybody else other than Mr. O'Connell, if I knew who he was; I had never seen any of those fellows before, and I had seen Mr. O'Connell before, and was willing and ready to take his advice. We took up a collection at the Lodi Meeting for the expenses we had there; I can't tell how much was collected. I helped to take up the collection but paid no more attention to it.

Cross-examination.

By Mr. O'Connell:

At that meeting that night at Lodi, I heard Mr. O'Connell say in answer to somebody's question "everybody should follow the law and take every legal step required by the act. I couldn't just say when he said it, but I know he said it. At the meeting there were young, old and middle aged people, and they were all asking questions from the different parts of the hall; there were quite a few questions; somewhere around about 25. All of the questions received some sort of an answer. Somebody asked about taking the examination Monday morning, and Mr. O'Connell told them to go

and take it, and he followed that up by saying "Take every step required by the law." Yes I understood Mr. O'Connell told me not to take the oath or sign any papers. That is what I understood by the law. I remember Mr. O'Connell answering that those taking the examination, if they do not want to be put into the military service, if they want to test the law they must remain under the civil law and therefore when they take the physical examination, if they want to remain under the civil law not to take the oath that would
103 put them in the military service. When I signed the paper at Stockton on Monday after Mr. Lockemeyer came back from telephoning to Mr. O'Connell, it was in consequence of Mr. O'Connell's directions, and I signed it and immediately took the physical examination, and they refused to let me take the examination until I signed that paper. I never filed the O'Connell claim of exemption.

WILLIAM A. GRAY was duly sworn and testified as follows:

Direct examination.

By Mr. Preston:

I reside at Salada Beach, San Mateo County, and I am an accountant, and I am acquainted with Dr. Hoffman and Mr. O'Connell, and Mr. Wacker, defendants. I have known Dr. Hoffman about two and a half years, and Mr. O'Connell and Mr. Wacker since August 2, 1917 when I was asked by Dr. Hoffman to open a set of books for the American Patriots; I worked on the books until about ten o'clock that night in the Mechanics Building, then went down to the hall in the Pacific Building where there was a meeting of the American Patriots that night. On the same day I met Mr. O'Connell in the office of the American Patriots in the Mechanics Building. My work was simply a mere service to Dr. Hoffman. Mr. O'Connell's law office is in the Pacific Building. There were about 30 or 40 present at the meeting, and I should judge about 10 or 15 per cent of them were within the draft age. I heard Mr. O'Connell address the persons present at the meeting. I don't remember exactly what Mr. O'Connell said, there were a great many different remarks made at the meeting; one of the things was that they needed money to carry on the purposes of the organization, and that if they took the oath they would be under the military authorities, or in the jurisdiction of the military authorities. He stated that they desired his money for the purpose of carrying on the American Patriots; the purpose as explained by him, was to test the constitutionality of the Draft Act.
104 The point was made that all they could get was one year in jail while they were testing the act; He stated that in the meeting, I don't remember that he said anything about wanting the boys to refrain from going into the military service, or that he wanted them to go into it. I discussed the matter with Dr. Hoffman several times and he said the purpose of this organization, American Patriots, was to test the constitutionality of the draft act. The idea was to keep the boys out of the army although he did not say so in

plain English. I worked two days on the books at the office and at Dr. Hoffman's house one night; I concluded my labors about August 10th or 11th. I saw at the office a list of names of four or five pages; about 150 names on the list and they were not members of the organization. Mr. Wacker prepared and mailed literature to the names and addresses on this list; he folded the literature and put them in envelopes which were Mr. O'Connell's personal envelopes; they were the same as Government Exhibit No. 11, and Exhibit No. 2 was also mailed out by Mr. Serbin. This is all of the literature that I know of being mailed out. I should judge at two different times about 300 or 400 pieces were sent out. At this point there was offered and admitted in evidence as Government Exhibit No. 21, envelopes addressed to L. A. Blasser, 701 Sutter Street, San Francisco and Otto W. Graf, of 331 Connecticut Street, San Francisco, California. On the left hand was printed Daniel O'Connell, attorney at law, 944 Pacific Building, San Francisco, and it bore the postmark of August 5th.

While I was working at the office in the Mechanics Building I saw a number of young men coming in and out of the office, who claimed they were of the draft age; while I was there working Dr. Hoffman and Mr. Serbin were in charge of the office, Serbin being a boy about 15 years of age, who had charge of the office when Dr. Hoffman was away. When these people came in they would ask what
105 the object of the organization was, and Dr. Hoffman would hand them one of those circulars, and then if they paid they were sent to Mr. O'Connell for advice. I heard some of those young men tell Dr. Hoffman that they didn't want to go to war; in answer to that Dr. Hoffman would tell them that there was only one way to do, and that was to test the constitutionality of the Act; if they joined the Organization they were then sent to Mr. O'Connell or taken to Mr. O'Connell. Either Dr. Hoffman or Mr. Serbin took one by the name of Mettler and some other boys who came from Lodi over to Mr. O'Connell's office. Lockemeyer, I believe, was the name of one of those boys he brought in government exhibit No. 18. Mr. Wacher would take care of the office part of the time during the absence of Dr. Hoffman. (Dr. Hoffman once told me that he was advised by Mr. O'Connell that this organization was the foundation for a new political party.) Dr. Hoffman told me that Mr. O'Connell, of course, would take care of him and see that he got a position. I tried to dissuade Dr. Hoffman from this organization, but he thought Mr. O'Connell's interpretation of the law was correct. I told Dr. Hoffman that I did not think the organization was clean, but he seemed to think that Mr. O'Connell's motives were of the best. There was nothing on the books up to the time I left about the money received at Lodi. I think it came in Mr. Samuel Lockmeyer's check. I saw one copy on the desk and one copy in the Lockmeyer's check. I saw one copy on the desk and one copy in the drawer of the desk of the legal opinion and advice on the conscription law; one I believe had the seal of the American Patriots on it. There were no signatures on them. There was a slight discrepancy of about $15.00 or $18.00 in the accounts before I

106 opened the books; the class of money I entered as receipts were donations, dues and fees. At the beginning the entrance fee was 25 cents and afterwards it was raised to $5.00, and then to $1.00 a month. When I first went there on August the 2nd, the dues at that time $5.00; prior to that they had been 25 cents, they were changed just a few days before August 2nd. All members that I came in contact with paid $5.00 and $1.00 per month. All the members during the time I was there were either of the draft age or were looking to get somebody else out of the draft.

Cross-examination.

By Mr. O'Connell:

I did not talk with everybody that came into the office and did not hear everybody who came in the office talk; I did not ask them their age, and did not hear other people ask them their age, and I don't mean to tell the jury that everybody that came into the office were within the draft age; every one that I remember of that joined the organization was within the draft age. As I remember, I should judge about 10 joined the organization, which included five or six which came down from Lodi; I don't remember the other four, but these ten were within the draft age. I can only recall one name of the ten, that is Samuel Lockemeyer, and I am not sure he was a member, but his name was in the book, and on the list that they brought down from Lodi.

The first day I was in the office practically all day and part of the night from about half past eight or nine o'clock in the morning. I am a close friend of Dr. Hoffman and intimate associate. I was subpœnaed to testify on Wednesday of last week, which is a week ago tomorrow. The first day I was at the office, I went of my own volition to Mr. Allen, one of the Special Agents in the Bureau of Investigation of the Department of Justice, he was in charge during Mr. Rathbun's absence from the City. I went to him on August 3rd, and the same day I went to my lawyer, and I told Dr.
107 Hoffman I went to my lawyer, and the same day I went up to Mr. Allen's. August 3rd I told him that I was opening the books but was not in sympathy with the movement; I did not tell Dr. Hoffman that I went to see Mr. Allen, but I told Dr. Hoffman not to say anything in my presence that I might have to testify against him. Mr. Allen told me to go on and finish the books; he said it was well that I came and told him; that is all I remember that he said. I went back to work on the books on August 4th and August 10th or 11th. I stopped on August 12th; part of my work was done at Dr. Hoffman's house and part at the office of the American Patriots in the Mechanics Building.

I never told Dr. Hoffman or any of his family or anybody connected with him that I had been to see Mr. Allen; I was not being paid for working on the books, and there was nothing to prevent me stopping the work at any time, but Dr. Hoffman asked me to con-

tinue. After seeing Mr. Allen I was afraid I would get into trouble myself, but I did not stop because my attorney told me that I could not get into any trouble as I didn't join the organization. I had never enlisted or tried to enlist (I am beyond the draft age and incapacitated) and never presented myself to find out if I was disqualified, or incapacitated; I saw Mr. O'Connell at one meeting in the Pacific Building; the door of the Assembly hall was wide open; everybody was admitted; nobody accosted me when I came in or asked me if I had any right there and nobody was accosted when they came in. I did not get there until ten o'clock; the occasion of Mr. O'Connell saying anything was that some one asked a question as to whether they should take the oath; the substance of what I heard was if they took the oath habeas corpus proceedings could not be instituted because they were under the military authorities. The payment of money I thought was sufficient to join. Mr. O'Connell was present at the conversation between Dr. Hoffman
108 and myself twice, once in the office of the American Patriots and once in Mr. O'Connell's office. I do not remember saying "What is the use of having such a fuss of getting up a set of books over a simple affair like this"; but I do remember that I said to you to find out what had become of certain moneys paid to you by Dr. Hoffman. I have had several conversations with Dr. Hoffman about the organization at his home, one night about three or four hours, also at my house. I don't know who put the seal on that legal opinion. Miss Malloy was the secretary while I was there but I never saw her there. I saw Mr. O'Connell but twice at the office, he was there about 15 minutes in all. There were no circulars sent out other than those I have identified so far as I know.

I said to Dr. Hoffman, Dr. don't discuss this matter in my presence, you and I don't agree as to the principles and as to the methods of the organization.

MICHAEL GUINEY was duly sworn and testified as follows:

Direct examination.

By Mr. Preston:

I am a member of the American Patriots within the draft age; I did not file an O'Connell exemption claim; was notified to appear for physical examination on August 8th; I appeared and I refused to submit to the physical examination then, and for four or five weeks; I took the physical examination two weeks ago; I refused to take the physical examination because I had the idea it would bring me under the military authorities; I thought it would bring me within the military law to take the physical examination. When I found out it would not bring me within the military law I then took it. Mr. O'Connell told me it would not bring me within the military law to take it. Had he not told me to take it I would have still refused. I acted on my own ideas before I consulted Mr. O'Connell. I had not consulted him at the time I first re-

109 fused. I was acquainted with the American Patriots and Mr. O'Connell when I refused and had been to see Mr. O'Connell. When I first saw Mr. O'Connell I went to join the organization, I first heard of the organization in the meeting at Dreamland Rink, at the meeting for Mrs. Skeffington, and I met a young man out there and he told me about the American Patriots, he did not tell me the purposes; I then went to see Mr. O'Connell and he told me the objects was the law was unconstitutional; he didn't tell me anything about joining the society; I am not trying to conceal anything; he told me the law was unconstitutional; that is all he told me; he did not say anything about joining the association or what its objects were. He told me the draft act was unconstitutional; I thought if this law was unconstitutional, and Mr. O'Connell was taking up this thing I would join it for that benefit. Mr. O'Connell told me he was taking up this thing; he told me it was unconstitutional to draft a man and that he had this society which was going to look after it; he didn't tell me what they were going to do; he didn't tell me to do anything, just to join the organization; I was trying to keep out of the war. I have not yet made up my mind whether I will answer the colors if I am called upon to appear; I have not made up my mind whether I will or whether I will not; I am fighting to keep from under the military law, and would not have accepted the military examination if I thought it would put me under the military law. I do not yet know whether I will go and appear at a certain place if I am summoned today or tomorrow. I want time to think over it.

Cross-examination.

By Mr. O'Connell:

I was arrested after I came to see Mr. O'Connell. When I was arrested I came down here before the Commissioner with my father and gave bail; Mr. O'Connell was present at the time I gave
110 bail; I had seen him before then in reference to the American Patriots. I joined the American Patriots down in the Pacific Building up on the 6th floor, I think. It was at Mr. O'Connell's office, I think, but I cannot recall the number on the 6th floor. It was the the office of the Constitutionalists; their office is on the 6th floor, and it was the Constitutionalist I joined; I was mistaken when I said it was the American Patriots I joined. The office is at 631 Pacific Building. Mr. Allen is their lawyer. When I went to be examined I thought because I was not a citizen, I had only my first papers—that I would not have to take the physical examination, but they told me I would and locked me up and left me in jail for four days; during those four days neither Mr. O'Connell or any other lawyer called upon me, and I did not send for Mr. O'Connell. The first time I saw Mr. O'Connell was when my father and somebody else were down here in Commissioner Krull's office giving the bail; my father and the other bondsman came to Mr. O'Connell's office for the purpose of getting me out, and when they came down here to give bail, that is the first time I saw Mr. O'Con-

nell; and Mr. O'Connell appeared in Court for me before Mr. Krull since I gave bail. I have not been indicted; it was about five weeks ago that I was before Commissioner Krull, about August 12th; I have never had any hearing before Mr. Krull. I had a talk with Mr. Preston, United States Attorney this morning; I never went to consult him, but he talked with me; I never saw Mr. Preston before in my life, but I was standing outside of the door this morning and he asked me why I submitted to the physical examination, I was subpœnaed as a witness this morning. I am positive now that it was the Constitutionalist- that I joined, and it was to their office 631 Pacific Building that I went.

Redirect examination.

By Mr. Preston:

111 I did not see Mr. O'Connell at the Constitutionalist place. I paid Mr. O'Connell $5.00 after I was arrested, but not before; I did not see Mr. O'Connell at the time I first refused the physical examination. My case has been postponed a number of times before the Commissioner; the last time I told him I would take the physical examination and I went and took it and I am out on bail. I was not asked to sign any papers; I have taken no oath, and was not advised whether to sign any papers or not, I was not asked to take the oath. The $5.00 I paid was an initiation fee into the American Patriots when I came to Mr. O'Connell with my father and the other bondsman. At the constitutionalist meeting the draft act was discussed in some speeches.

JACOB M. HIRSCHMAN was duly sworn and testified as follows:

Direct examination.

By Mr. Preston:

I was born in Poland, Russian, and my nationality is Hebrew. I have been a citizen nearly five years; have been notified by the exemption boards to appear before them for examination; I joined the American Patriots before I appeared; I filed an O'Connell exemption claim and paid my entrance fee to the American Patriots before I did. My purpose in joining this organization was merely to test the constitutionality of the draft act; it didn't mean that I wanted or didn't want to go to war. I thought I had a right to question the constitutionality, and I expressed that to the exemption board. I thought Mr. O'Connell was the best lawyer to have it tested. I thought by joining the Patriots that would have hired Mr. O'Connell to take my case; I didn't know whether I would be put into the military service while the test was going on or not. I have been physically examined and pronounced fit, but not notified to ap-
112 pear.

At this point the following objections and statements were made. made.

Q. If you are notified to appear, do you expect to go?

Mr. O'Connell: May I object to this question. This case is to be prejudiced one way or another by what this gentleman may make up his mind to do or not to do in the future—is that the proposition? Now, no one could know that except himself. We should not be prejudiced, and that is the only purpose, of course, for which it is offered.

The Court: I can understand there might be another purpose, and that is to determine what effect there has been upon his mind by what he has learned through his connection with this corporation called the American Patriots.

Mr. O'Connell: But there is no evidence of that. He has not asked him that question, what effect it had on his mind. He says that before that he wanted to test the constitutionality of the act. That is his testimony. What he may or may not do in the future is offered against us.

The Court: Well, I think I will sustain the objection to that question.

The witness resumed his testimony as follows: Some time in July or August I first heard of the American Patriots, cannot say, but it might have been at some Dreamland Rink meetings. Mr. Mills and Colonel Woods and several others spoke; Mr. O'Connell spoke at one meeting on "True American Patriotism" I cannot say just what he said. None of the other defendants spoke at any of the meetings I attended. I was not at a meeting at Moose Hall; I was at one meeting before I heard Mr. O'Connell speak, and before I joined. I think Colonel Woods spoke. I was up to some meetings afterwards and attended the American Patriots meeting in the Assembly of the Pacific Building. Mr. O'Connell spoke twice; he said in his
113 opinion the draft act was unconstitutional; he didn't mention anything about what would become of me while he was testing the case; he didn't ask permission to use my name to test the law, or anybody's name. I don't know whether he ever commenced any proceedings of any kind to test the law; I did not ask him when he was going to start proceedings to test the law. My idea in joining the American Patriots was simply to test the constitutionality of the Act. I have read the circular; I was of the opinion that the law was not constitutional, that was my own opinion about it. I have not studied law, but I was of the opinion that the conscription act was unconstitutional. Nobody solicited me to join the American Patriots; I saw a circular letter from the American Patriots; read it through and it was my opinion too, and I thought it would be best to join them, as I was not rich enough to be able to test it myself. I didn't think I would be getting the service of an attorney by this entrance fee and $1.00 a month; I was under the impression, and am now, that the draft act is unconstitutional. After I read the circular letter stating that the American Patriots were willing to test the constitutionality of the law, I thought it — for me to join them because I am not rich enough to stand it myself to do the testing.

Exception No. 5.

At this point the following questions were asked, objections made, rulings and answers given and exceptions taken.

Q. Are you willing to enter the service now?

Mr. O'Connell: I object to that for the same reason as before.

Mr. Preston, U. S. Attorney: That is a different question.

The Court: Yes, that is a different question; that is proper enough. You see he is now asking if he is now willing to join the service. Before, he asked him should he be called would he be willing; that is asking for his action upon a future contingency, and I sustained the objection.

114

Mr. O'Connell. But it is something that is in his mind that is going in as a part of the question.

The Court: Witnesses can very frequently be inquired of as to their state of mind; that is frequently the purpose of putting them on the stand.

Mr. O'Connell: Your Honor will save an exception to the question on the ground that it is immaterial, irrelevant and incompetent, and no foundation laid.

To all of which the defendants then and there duly objected and excepted, and now designate it as Exception No. —.

Thereafter the witness resumed his testimony as follows: I don't understand what you mean; if the law is declared constitutional and held valid I will be willing to enter the service. The paper you handed me is the circular I read, I got that circular and read it over, and after a little consideration I thought I would join. I don't know that there is any suit pending now on behalf of the American Patriots to test the law; I am kept informed as to what the American Patriots are doing, and I have not as yet heard of any such suit. I don't know what the circular means and what it says; I did not go as de-ply into it as to think that it was organized for the purpose of testing every executive act of the President and every act of every member of his cabinet, or of the military authorities, or any act of congress relating to the prosecution of the present law; I thought it applied to the conscription act in regard to service abroad; there are certain other points there in the circular which the American Patriots make. I am 29 years of age; I have not been in conference with the defendants since I was subpœnaed as a witness. I have just met Mr. Westerfeld and another man when we went into the District Attorney's office this morning. Nobody advised me to take the physical examination; I went and took it myself because I didn't see anything wrong in it; just the same as I didn't see anything wrong in the registration and I registered. The exemption claim that I filed contained language at the bottom of it, which charged that the British government is running our government. I don't believe that, but I didn't care for a word or

115

so whether it was correct or not correct; it was the sense that I understood. I filed the petition to claim that I thought the law was unconstitutional. I read over the exemption claim, not so carefully, but I was satisfied with the contents of it and signed it. I understood it thoroughly; I got it at the office of the American Patriots myself, and read it, and whether the words in it were correct or not, the whole point with me was testing the constitutionality of the conscription act. This is my opinion that we are not in any danger to the United States as expressed in the claim of exemption. I am judging the case myself and decided in my own mind that it was unnecessary for the United States to go to war, and I was against war. Some of the things stated in the claim of exemption I know; there are lots of things that are not proper, that are lies published in the newspapers; it is my opinion that there can not be any danger to the United States. If anybody wants to start anything let them start it, they wouldn't need any conscription at all. Certainly I believe that this war is a war of ag-ression, conquest and greed, and that this is not a war of defense. I have not filed any other claim of exemption; I have not supported it by any affidavits of
116 any kind, have not prepared any affidavits, and do not expect to. I can not see that I am resisting the draft law at the present time. I have been in this country 11 years, have no family except a brother in New York who is 22 or 23 years of age; I don't know whether he filed an exemption claim. No one explained this claim to me at the time I took it; it was lying on a table in the office of the American Patriots; the boy was there probably he gave it to me; it was none of the defendants. It was in the office of the American Patriots in the Mechanics Building.

The claim of exemption signed by the witness was then put in evidence and marked U. S. Exhibit No. 22 (Original of exhibit to be transmitted to the Supreme Court pursuant to stipulation).

Cross-examination.

By Mr. O'Connell:

I have done nothing other than file this claim of exemption with the district board. I registered and took the examination, and that is all I have done besides filing the claim. I have made no threats against anybody or stopped anybody else from enlisting. I heard Mr. O'Connell at these meetings in the Pacific Building state that he believed that everybody who wanted to enlist should enlist, and that it was their duty to enlist, and that every person who advocated war, especially the newspaper people and the editors and other public speakers should be made to go to war first; and that it was only for those people who had conscientious objections and who determined in the first place not to enlist, and also to test the unconstitutionality of the draft act, that the organization had nothing to do with only those people. He also advocated that the constitution should be changed so that we should not have any war again unless the
117 people voted for it in the first place. He also said in these speeches that he stood pat with the statement of the President

to the Senate on January 22nd of this year, "Peace at once without victory." He also said that there was no victory in war; that whoever won always lost; he showed by history that there was always a loss, that Napoleon was victorious and almost conquered the world, but still it was a war of aggression, and he referred to the history of Alexander the Great and to Louis XIV, and that all of their victories amounted to nothing. I never talked with Mr. Preston until this morning; he questioned me in his office, and said something about arresting me if I did not testify right, or that in substance; he asked me a question which I said I will testify to in here, and he just simply said, "Well, I can have you arrested like this"; he summoned me before the Grand Jury; I am ready to go before the Grand Jury; am waiting all day long to go.

Redirect examination.

By Mr. Preston:

Mr. Preston asked me whether I will join the colors, if I get a card will I go, I said I will answer it in here; he got a little sore because I answered it in the way I did; he said "Why don't you answer me?" I said "I will answer it inside." I did not answer the question because I didn't consider it.

MICHAEL DONLON was duly sworn and testified as follows:

Direct examination.

By Mr. Preston:

I am 28 years of age, not a citizen; have taken out my first papers; have been examined and physically *excepted*, and notified to appear and drafted, and I have refused to go. Mr. O'Connell is my lawyer.

Cross-examination.

By Mr. O'Connell:

Mr. O'Connell had nothing to do with my going or not going. Mr. O'Connell said to *be* that everybody who wanted to enlist should enlist, and that it was their duty to enlist. He also said that these newspaper men and other people who were advocating war
118 should be forced to go to war themselves. I first sought Mr. O'Connell for legal advice; I wanted to have a talk with him, I didn't know he was connected with the American Patriots at all, and I didn't know that he had anything to do with them; it was before I signed the Patriots, I can not tell the date, I was determined not to be drafted. I told Mr. O'Connell that I objected to the draft on account of thinking it was in favor of England; and that I didn't want to take up arms at that particular time. I told him that I was willing to fight for the United States at any time, but I said I was not willing to take part in the European war, on the ground of England being in it; that was my object and my only object for evading or

trying to test it, or having anything to do with it at all. I joined the American Patriots to test it, to see if I could have any chance of keeping out of the war. I don't know that they have ever commenced any proceedings or taken any steps to protect anybody. I was arrested and am out on bail now, and determined to test the constitutionality of the draft act, and that is why I gave bail and why I am fighting that case. That has been my determination all along before I ever heard of the American Patriots. The fact that I found the American Patriots in existence afterwards, did not have anything to do with my determination, except in a certain degree; if I didn't try it that way I intended to try it in some other way. I thought it was a legal way of going about it. I saw Mr. O'Connell before I went for examination and he told me to go ahead and take the physical examination, but not to sign and papers or take any oath that would put me into the military law. He told me that by taking the oath, if I wanted to test it that I would have to go, and would not have any way out of it if I took the oath. He told me that taking the oath would put me in the military service as an enlisted man and not a drafted man. I had a talk with Mr. O'Connell on two or three occasions; I was alone the first time and the second time there
119 were two more with me, John Murphy and Mr. Carey, the defendant. I was arrested at my home and taken down to the Marshall's office.

Redirect examination.

By Mr. Preston:

At my first talk with Mr. O'Connell I said I was an Irishman and didn't want to fight for England; he said he didn't blame me, nor would he want any Irishman, or something like that. He said he was an Irishman, in substance he said "I don't blame you, I would not want any Irishman to." I had reference to the present war; I was trying to keep out of the American army under the conditions of the conscription act. I was wanting to keep out of the army of the United States because I had decided in my view that it would be helping England. Mr. O'Connell said he did not want to see any Irishman fight under those conditions and did not blame me. Mr. O'Connell and I had judged the war and decided that we didn't want any Irishman to fight in it and that I didn't want to fight in it under the conditions. When I got the notice to report for military service, I went to Mr. O'Connell's office and told him that I got my final notice to appear at my district board in the morning, and Mr. O'Connell said to me, "Donlon do you want to go?" I said that I didn't. "Well," he says, "it's up to you, if you want to go now" or test the case. I told him I was willing to take the consequences, to test the case, or do what I could about it. I think it was on Tuesday that I was supposed to appear, and I saw Mr. O'Connell on Monday, a week ago yesterday. I have taken no other steps to test the law. Mr. O'Connell has not told me what steps he is going to take; I left my case in his hands. I have talked with Mr. Carey and some fellows around here about my case and Mr. Carey told me to please

myself, to do what I thought fit, but did not tell me what he was going to do. I never asked Mr. O'Connell why he had not started a suit.

120 Recross-examination.

By Mr. O'Connell:

I told Mr. O'Connell that I did not want to comply with the conscription, as I thought it was in favor of England, and that I did not want to take up arms at that time for that cause, but that I was willing to fight for the United States; Mr. O'Connell, I think he said to me, that he didn't blame me and wouldn't blame any Irishman on them grounds. I told him that my folks lived on 30 acres, that there was a family of 12 of us that lived *in* 30 acres in Ireland, and had worked from early morning until late at night, and we could not get enough to live on, owing to England taking the stuff away from our farm. The condition is that my father had to work 30 acres of land back there, and he had four sons of us, and himself, and we were all working the land and all made a poor living out of it, and I got prejudiced against England and I never would take up arms and never would do anything in her favor, even under the penalty of death, or whatever it might be, I don't know what it might be; I said I never would assist her in any form, under the penalty of death. That is how I felt about it before I ever saw Mr. O'Connell or the American Patriots or anybody else. I am now defending this case on which I am out on bail, and have instructed Mr. O'Connell to defend it, and he has informed me that the case would have to be brought to the Supreme Court of the United States in all probability, and the constitutionality of the draft act would be set up at the trial, so that the record could be prepared sufficiently to present it to the Supreme Court of the United States, and the unconstitutionality of the draft act is to be the defense in that case on which I am out on bail.

The United States Attorney here offered in evidence the record of the two cases of United States against Samuel Cohen and United States against Vittorio Gambo wherein judgment of guilty was entered in the United States District Court at San Francisco
121 against each of the defendants for failure to register, June 27, 1917, and sentencing Gambo to one hour in the custody of the Marshal and Cohen to 30 days in jail, in both of which cases Daniel O'Connell appeared for the defendants and filed a demurrer setting up the unconstitutionality of the draft act, in substantially the same manner and language as set forth in the demurrer in the present cases, and offered this demurrer for the purpose of showing that Mr. O'Connell then had an opportunity to test the draft act, and did not do it as each of the defendants served their time and has been discharged at the expiration of their time. The said demurrer in the Cohen case was read to the jury and the demurrer in the Gambo case was considered read being in the same identical language as the Cohen demurrer.

The record in the said case showed that indictments in the said case were returned in Court and filed on the 19th day of June, 1917, and charged that the defendants therein named had failed to register under the Selective Service Act; that in both cases demurrers charging that the said Act was unconstitutional were interposed by Daniel O'Connell, appearing as Counsel, and that said demurrers were overruled by the Court; that thereafter the said cases came on for trial, that both defendants were regularly convicted, and judgment pronounced as aforesaid; that the said demurrers are alike and are as follows:

"Defendant's Demurrer to Indictment."

"Now comes the defendant in the above entitled cause and leave of Court having been first obtained, files this, his demurrer to the indictment in said action and among the grounds of demurrer assigns the following:

I.

The said indictment does not set forth facts sufficient to constitute an offense against the Constitution or laws of the United States.

122

II.

The Act of May 18, 1917, was passed and the Proclamation of the President of the United States referred to in said indictment was made and issued, without any authority of law therefor, and each is unconstitutional; null and void, for the following among many other grounds:

a. Said act declares that whatever regulations may be prescribed by the President of the United States, and upon whatever notice he may give, shall become law, but Congress could not delegate to the President of the United States the power to make or prescribe regulations to become law upon proclamation or other notice as in said Act of May 18, 1917, as it was, and is, a delegation of legislative power to the executive department which the executive department of the United States cannot exercise.

b. Said Act was also an abandonment by Congress of the legislative powers, and duties of Congress, and said Act is void as in violation of Sections 1 and 2 of Article 1, and other provisions of the Constitution of the United States.

c. Subdivision- 12 and 14 of Section 8 of Article 1 of the Constitution of the United States gives exclusive power to Congress to raise and support armies and to make rules for the government and regulations of the land and naval forces which power cannot be delegated and said Act of May 18, 1917, is in direct violation of said Constitution.

d. The Constitution of California, and the Constitution of the United States prohibit the executive department or any officers of the executive department, exercising the powers of the judicial department, or legislative department, or controlling or influencing these

departments, or either of them, and yet the said Act of May 18, 1917; especially Section 6 thereof, specifically violates those provisions and purports to give to the President of the United States complete control and domination of the judicial and legislative
123 departments and the officers of said departments of the United States and of each of the several states and territories and the purported right and authority to exercise the powers of said legislative and judicial departments by requiring the officers, agents and persons in said department to perform any duty he shall offer or direct, and said Act of May 18, 1917, and the Proclamation of the President of the United States, are each without any authority and each is in direct violation of Articles I, II and III of the Constitution and Articles IX and X of Amendments of the Constitution, of the United States; and Sections 1 of Articles III and Section 18 of Article VI of the Constitution outside the boundaries of the United States and forcing the persons registered and drafted to go to Europe and other foreign countries to assist those countries in a war of aggression and conquest in Europe with all the probabilities that the persons so registered and drafted will never return to the United States but will be killed in Europe or other countries while in said army and said Act of May 18 and said proclamation are each in violation of the first sentence of the Constitution of the United States and the objects and purposes of said Constitution to "establish justice, insure domestic tranquil-ity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity."

Wherefore, the defendant prays that this his demurrer be sustained and he be dismissed and his bail released and exonerated.

DANIEL O'CONNELL,
Attorney for Defendant.

124 Direct examination.

By Mr. Preston:

Mrs. JULIA MANLEY was duly sworn and testified as follows: I am married, I reside in San Mateo, California and the only defendant I am acquainted with is Daniel O'Connell. I never saw the Articles of Incorporation of the American Patriots and which was government Exhibit No. 3, and I never signed my name to the articles, or went before any notary public, or ever read the paper, but one of the ladies, Mrs. Krauss, whose maiden name was Margaret Malloy, told me that she signed my name to it. I first learned this on or about July 12th, 1917. I called up Mr. Yost's office in San Francisco to tell him that I would not be there for the meeting, which was fixed for noon, July 12th, and Mrs. Krauss answered the phone, and I told her that I would not be there; she later in the afternoon phoned to me and said that she had signed my name. I didn't do anything about it. I told her to take my name off, that Mr. Manley threatened to go to law about it. I think I saw the defendant Herman B. Smith on the evening of July 10th, in Mr. O'Connell's

office. Mrs. Krauss and myself about July 10th went to Mr. Yost's office, she wanted me to meet Mr. Yost who had spoken at a Socialist meeting; we went to Mr. Yost's office and he took us into Mr. O'Connell's office and introduced us to Mr. O'Connell, which is the first time I ever saw Mr. O'Connell; they said there was to be a meeting the next evening to form an organization, but they had not decided on the name. We discussed the meeting and I said I would come the next evening and I came. We talked of a name, various names were suggested, and Mr. O'Connell said that "American Patriots" covered the whole thing and was shorter. I should think about 20 people were there, and we were to meet the next day about noon to form the organization and I supposed to elect officers. I
125 didn't go to the second meeting at noon the next day, and I never saw Mr. O'Connell since, that evening until I saw him in court. At neither of these two meetings were any papers displayed for my signature, and I did not sign any but agreed to meet the next day. Mr. Yost had his office next door to Mr. O'Connell's and Mrs. Kraus answered the phone, and I told her that I would not be there, and she asked me if she should act for me and I said, No, I would be in in a day or so. Later in the day she called me up and said that she had signed my name to the papers. I didn't threaten her then but next morning I saw an article in the newspaper and went and told my husband, and he had seen it and I asked him what to do.

"At the time I called up Mr. Yost's office I had abandoned the idea of becoming a part of the organization, Mrs. Kraus' maiden name is Margaret Malloy. I don't remember exactly what was said at the time we were there, about the names we should use. I think she spoke about her name being a German name, and that her maiden name was Margaret Malloy, an Irish name. The purpose of my attending these two meetings was that Mr. O'Connell spoke about having a referendum and a recall of the Draft Act. I was in sympathy for using our influence with the Representatives to repeal the Draft Act which I wanted repealed. I have never had anything to do with the organization since. Nobody requested my resignation. I paid no money except that I gave a dollar when Mr. Yost took up a collection that evening the last time I was there. Nobody requested me to appear before a Notary Public. I do not know Henry B. Lister, the Notary Public.

Cross-examination.

By Mr. O'Connell:

The first time I ever saw Mr. O'Connell I was brought in his office by Mr. Yost, Miss Malloy (Mrs. Kraus) was with me. The next time we meet was in the assembly hall of the Pacific Building the next night.

126 The meeting that night was in the Assembly hall in the Pacific Building; there was a general discussion there among the 20 odd people present about the constitutionality of the draft law, and that Congress should not have the power to declare war

without first having a vote of the people on it, and that the Constitution ought to be amended so as to have that provision in the Constitution, and that there should be a referendum first before any more war should be declared. I took a part in the discussion, Mrs. Krauss, I think had two sons subject to the draft act. I had no relations of my own, but was interested in it from a humanitarian standpoint; I didn't believe in war.

"Before I left it was understood that I was to be at Mr. O'Connell's office the next morning about 11 o'clock to form the corporation or club or league or whatever it was. I did not see Mr. O'Connell at any time after that. The next morning there was an item in some paper and my husband saw it, and we had some discussion, and after that I phoned up to Mrs. Kraus. I had had no talk with her in the meantime."

Direct examination.

By Mr. Preston:

ALFRED WUESTEFELD was duly sworn and testified as follows: I am a citizen born in California, age 21; am a truck driver by occupation; am duly registered, and physically examined under the draft act. I filed one of the O'Connell claims of exemption, and have not yet been notified to appear for service, but am expecting to be. I filed the O'Connell claim of exemption Aug. 20, that is the one shown me. The claim of exemption was then offered and admitted in evidence and marked U. S. Exhibit 24 (original exhibit to be transmitted to the Supreme Court pursuant to stipulation.) I have not yet signified my intention to refuse to go. I have not decided yet what I am going to do. I joined the American Patriots
127 August 20th; my purpose in joining was to have the constitutionality of the draft act tested in Court. I did not ask what steps had been taken or whether any would be taken to have that done when I joined. I have not been interested enough to see whether any steps would be taken, and have made no inquiries about it. No one asked for the privilege of using my name as a plaintiff or petitioner to start any case. I am not trying to avoid military service. I joined the American Patriots to have the constitutionality of the draft act tested in Court. I am not willing to go under those conditions. It is the truth that I am not going. I didn't join the American Patriots to see if the American Patriots could keep me from being made to go, but I don't want to go unless I am made to go. I did not join the American Patriots thinking they would keep me from going. The only reason I joined was to have it tested in Court, to see if I had to go, that was to avoid the necessity of going. I never engaged Mr. O'Connell as a lawyer; I have talked with him a few times; have never asked him if I would report for service when needed, and never asked him what I am to do if I am notified to appear, as I decided to do what my own mind tells me when I am called. I don't know whether I will send for Mr. O'Connell or not if I am called. I invested my $5.00 in the organization, but not with Mr. O'Connell. It is all right for the

American Patriots to circulate this literature and carry on their propaganda. I don't know how much money is in the treasury of the corporation called the "American Patriots." There was a meeting at Dreamland Rink where Senator Works and Mr. Mills were speaking. They collected something like $500 that meeting, that is why I joined the American Patriots, and I joined because I thought they were real patriots, but that meeting was the first and
128 only time that I had heard of them; I joined about two or three days after that meeting. Joe Lame joined at the same time. The reason that I did not want to go to war without being made to go is that I have relation- over there and would not like to fight against them; I am of German descent. I did not say that I did not intend to go.

Cross-examination.

By Mr. O'Connell:

The meeting where I first heard about the American Patriots was a meeting under the auspices of the People's Council of Democracy, at which Senator Works and Colonel Wood and David Star Jordan spoke, Mr. O'Connell spoke for a few minutes. Mr. O'Connell had been arrested before I joined the American Patriots.

JOSEPH A. LAME was duly sworn and testified as follows:

Direct examination.

By Mr. Preston:

I was born and raised in San Francisco, of French parentage; I filed one of the O'Connell claims of exemption on the 21st day of August; I had not heard whether Mr. O'Connell was arrested or not. I was prompted to join the American Patriots by the talk I heard at a meeting at the Dreamland Rink, as my opinion was the same as those of the speakers. The speakers were Colonel Woods, Rev. Mr. Whitaker and Mr. O'Connell. I joined the organization because they had the same views that I had. I will fight for America in America, I will defend the country in case of invasion. I want to defend my country. According to the Constitution that I read it states that any American being drafted in the army is to be kept in his country here in case of invasion; I saw something in the constitution about that. I bought one of the small books about the constitution that they were selling at the People's Council meeting, I got the book at their meeting at Commandery Hall. It stated if they drafted a man
129 in the army they should draft him only for this country. If a man enlisted voluntarily they can send him any place they wish. I read the constitution and have always heard that the constitution states that any man being drafted in the army is supposed to fight and defend America in case of invasion. I object to drafting men and sending them abroad. We have ships here to defend the coast; I am not saying that I would not go if I enlisted, as a drafted man I object to going to Europe, or any foreign country to fight;

if I am drafted I will fight on this soil here, but if the constitution states we should I will change my views. I didn't exactly think I would get the relief I am speaking about by joining the American Patriots. At this point, at the request of the United States Attorney the two books the witness said he read were produced and delivered to the United States Attorney. The witness resumed his testimony as follows: This what I read "Cannot be taken beyond the limits? This is a quotation from the address of Hanis Taylor being one of two produced by witness and delivered to U. S. Attorney. The Witness reads as follows: "By an express prohibition of the constitution construed by the Supreme Court of the United States 90 years ago, no part of the national militia can be taken outside of the United States."

Q. Under whose auspices?

A. I think the People's Council. I got that at Commandery Hall at what was, I think, a meeting of the People's Council. Mr. O'Connell was presiding. Nobody talked to me about the Patriots; I heard them spoken of before that at a meeting; they were all talking about it in general, all giving a different version of it; I am not sure that they referred to it as a corporation, but they were talking about it at a meeting over at Dreamland Rink. The speakers were talking about the war and that it was not a just war, and all that. I
130 had my mind made up before I went over there to the meeting that I will fight for America in America. Colonel Woods was talking about the war, and Mr. O'Connell was telling about the constitution, and I thought they had the same opinion that I had so I joined the American Patriots. I went to the meeting of my own accord, and after hearing these two addresses and finding they coincided with my own views, and reading these pamphlets I decided to join the American Patriots. I understood the money is to be used to test the constitutionality of these new laws; I can not say how much they have on hand or what they did with the money. I was not thinking I was employing any attorney when I joined. I heard people talk and say that they would have to be tested in the higher Courts; I was not told how or when. I heard some say that I would probably be in jail and others say I would be out on bail when they were testing these laws. As far as I have anything to say I object to being shot into the army; maybe I can't stop them throwing me into the army, though; I don't believe in fighting over there; I just joined the organization because they have the same idea as I have. I just wanted to put my shoulder to the wheel and contribute to a cause that I concurred in; I just wanted to join the organization, and I am not asking anybody else whether they wanted to join or not. I got that piece of literature from a fellow on the street talking with me, and he told me that it was a good organization to join; I didn't know him at all; I don't know his name.

Cross-examination.

By Mr. O'Connell:

I heard Senator Works, David Star Jordan make their speeches that night at Dreamland Rink, and I heard Senator Works declare that in his opinion the draft act was unconstitutional. I heard him say that that claim was presented to Congress before it was
131 passed, and that while a great many senators agreed with it they said it was too late now. I paid for these pamphlets I got at the People's Council, they were both together. One of these circulars, such as Exhibit 11, is the one that this man showed me on the car, and I read it over before joining the organization, and my views were the same as those, that is why I joined it. At this point the defendants had these two papers which the witness testified he bought at the meeting of the People's Council, marked "Defendants' Exhibit No. 1, for identification, and the Government offered the O'Connell claim of exemption which this witness filed, and it was admitted in evidence and marked U. S. Exhibit No. 25. (Original of said exhibit to be transmitted to the Supreme Court pursuant to stipulation.)

CHRISTOPHER MCCULLOUGH was duly sworn and testified as follows:

Direct examination.

By Mr. Preston:

I was required to register, and was also notified to appear for physical examination, and I filled out one of the O'Connell exemption claims, and was instantly arrested at the time I filed it. I have two brothers of the draft age, one of them joined the American Patriots, his name is Gus, he is in the court room. I don't know whether he filed an O'Connell claim of exemption. He had had his physical examination. I brought a damage suit against Max Kuhl, one of the District Board Members; Mr. O'Connell appeared for me; the first I heard of it was when I was in jail, I read it in the newspapers. My brothers attended to that for me, and a few days after I was released I ordered it stopped. My idea in asking for one of these O'Connell claims was I thought the law was unconstitutional, and I wanted to file it in the form of a conscientious objection in the hope that the Board would pass on it as sufficient ground of objection,
132 or else throw it away. I read the exemption claim, especially the last part about England, and the claim that we were pulling their chestnuts out of the fire, and I let it go. I signed the paper and I personally endorse those doctrines in it; to a certain extent I did think that our country has been subsidized or over-powered or become a tool of somebody else, and we don't know how to run our own business over here. I didn't think they were going to give everybody who filed those exemption claims a test case; I thought it was going to be decided in Washington. The mere filing of the

paper I did not think was going to do me any good, but I wanted to file it as a conscientious objection and see if it would do any good. I didn't give any thought that the American Patriots had carried the matter to the Supreme Court of the United States, I thought that the matter would be decided in Washington, and that would cover the matter, and that the Exemption Board would either pass on them as conscientious objections or else throw them away. I didn't think they were giving me any test at all; I was not expecting the American Patriots to do anything here; I thought when I got my claim out of them that, that was about all I could get. I don't know how I heard of the American Patriots, whether it was that I saw the wagon, or somebody spoke about it, I could not say definitely. There were a good many young men in Mr. O'Connell's office; I saw them going in and out of his private office, I don't know whether they had been drafted or not; there was no conversation in the waiting room; and I had no particular conversation with Mr. O'Connell; I just went up in the morning and asked for one of these exemption claims and he told me to come back in the afternoon and get it, and I went back and got it.

133 Cross-examination.

By Mr. O'Connell:

When I was arrested I was held without bail, and they took me down to the City Prison, and would not allow anybody to talk to me, and my brothers sued out a writ of habeas corpus and brought me before the Superior Court, and then they made a complaint against me and Mr. O'Connell and others and I was arrested on the same warrant on which Mr. O'Connell was arrested. I was charged with conspiracy with him. My two brothers were attending to the case and looking after my interest; they caused suit to be brought against the officers that caused my arrest. I wanted to take the physical examination but these officers would not allow me. I presented this form to the clerk and the clerk said it was no good and it could not be presented unless it was on a regular Government form. I said, I will leave it here and you can suit yourself what you do with it. He asked Mr. Kuhl, the Chairman of the Board, if he wanted to accept it and Mr. Kuhl said, "You can leave it here if you wish but it is not worth a damn unless you swear to it." I said I will swear to it. He said, you can leave it here if you want to but it is absolutely worthless. I said, I will take a chance on that. I went down stairs to take the examination. They gave me a little certificate to fill out. While I was waiting for the pen and ink, and in less than a minute after I filled this, Mr. Kuhl came down and called my name out, and I said, here, and he said, "Officer, put this man under arrest." They took me first to the Richmond Station, then to the Hall of Justice. I was ready to take the examination; went there that morning for that purpose, but they would not give me a chance. The only information Mr. O'Connell gave me was to present this claim of exemption before I took the examination. After I dropped the suit

for false imprisonment, I believe they ordered me rejected for a physical disability.

134 MARGARET MALLOY KRAUS was duly sworn and testified as follows:

Direct examination.

By Mr. Preston:

My husband's name is Jules Kraus; I live in San Mateo Park, San Mateo. In July I was living at California and Lyon Streets, San Francisco; I am a Democrat. Mrs. Julia Manley has been a neighbor of mine for years. I signed the Articles of Incorporation of the American Patriots in Mr. Yost's office, which is next to Mr. O'Connell's, and they both using the same reception room. I signed the name of Julia Manley at the request of Mrs. Manley. It was left with Mr. Yost for us ladies to sign; it was an unfilled blank when I signed it and my name was the first name signed; then I signed Julia Manley. I knew Daniel O'Connell was to sign the paper with us; I didn't know who else was going to sign; I had met the Smith brothers, defendants, at Mr. O'Connell's office at the first meeting of the American Patriots before I signed the papers. Before I signed the papers I called it the organization meeting. When I signed no one was present except Mr. Yost. I did not see Mr. O'Connell. There was a discussion about our signing the papers at the organization meeting the night before. When I wrote Margaret Kraus it was erased by Mr. Yost, he saying that Mr. O'Connell left word to sign Margaret Malloy. I never appeared before a Notary Public. I signed on Friday, July 13th. I returned to Mr. Yost to have my name taken off but it was too late as Mr. O'Connell had already filed the papers. I am absolutely positive there was no writing whatever on the paper when I signed it. I understood that the organization was to be a political organization to work repeal of the draft law; there was also universal suffrage mentioned, and to test the constitutionality of various obnoxious laws, that was the discussion the night before, that is where I learned the purposes. At that
135 time Mr. O'Connell was very desirous of having Mrs. Manley's and my names on the document. I asked Mr. Yost if he was going to sign and he said no, that he had a German name; I asked the young man sitting next to me, Mr. Goetting, if he was going to sign, and he said he also had a German name. I said my plea is that I have a German name; Mrs. Manley then spoke up and said, "Sign your name Malloy," and Mr. O'Connell said, "That is a very good suggestion," it will remove every suspicion of its being a German organization." I don't recall who else was going to sign. I *attested* some meetings after that; I was present at the organization meeting when the officers were elected; I was elected Secretary, but I told Mr. O'Connell that I had poor health, and I was going to go away and must resign; he said I could drop out afterwards, but that it would add prestige to the organization if I remained, and I agreed.

I don't remember seeing the Smiths there when I was elected Secretary, or at any of the meetings after that. I met them at the first meeting, I mean the preliminary meeting the night that the organization of the corporation was talked about. When the officers were elected I was there and Mr. O'Connell, but Mrs. Manley was not there. I don't think the Smith boys were there that night. I made no motion while Mr. O'Connell presided. I cannot recall who voted for him as President. I think only Mr. O'Connell and I of those that signed the Articles of Incorporation were present when the officers were elected. I may be mistaken about the Smith- not being there.

The United States Attorney then read to the jury the minutes of the meeting of the American Patriots on July 17th and 21st as follows:

Q. Mr. Preston: Q. I will read to you the minutes of July 17th:

"At the meeting of July the 17th, with the approval of all
136 persons, Daniel O'Connell presides as temporary President and Margaret Malloy as temporary Secretary, Mr. Herman B. Smith having declined to serve as Secretary. The meeting was composed of four signers of the Articles of Incorporation and other persons eligible to membership. The temporary President first read the Articles of Incorporation. It was unanimously voted to proceed to the adoption of rules, regulations and by-laws for the corporation. On motion made and duly seconded, the first regulation, rule and by-law of the corporation adopted was as follows:

"All American citizens and persons who have secured their first papers on application for naturalization as American Citizens and who sincerely believe in the objections of the corporation and sign the roll of membership declaring such belief are eligible for membership in this corporation and on so signing the roll become members of this corporation.

"The second rule, regulation and by-law was unanimously adopted as follows:

"The dues for membership in the corporation shall be 25¢ a mo., commencing with the signing of the roll when the first 25¢ shall be paid.

"On motion duly made and seconded, it was unanimously voted that the committee of three appointed at the first meeting July 12th, 1917, with full power to act, continue with said full power and conduct the affairs of the corporation until otherwise ordered by the corporation.

"Upon motion made and duly seconded, and unanimously voted by the members, it was decided to meet again on the night of Thursday July 19th, and Saturday July 21st at 8 o'clock in the Auditorium of the Pacific Bldg., and thereafter upon Mondays, Wednesday and Saturday nights."

137 Here is the meeting of July 21:

"Minutes American Patriots Inc., Meeting July 21st, 1917.

"The meeting of the American Patriots, held Sat. Eve July 21st

was regularly called to order. President Daniel O'Connell presiding.

"It was moved, seconded and unanimously voted that Attorney Daniel O'Connell President Pro Tem., be elected President.

"It was moved, seconded and unanimously voted that Miss Margaret Malloy, Secretary Pro Tem., be elected Secretary, also that the present Ass't to the Secretary, Louis Serbin, be retained."

Witness continuing: I am not positive whether I ever saw the Smith boys in any meeting until after the papers had been made out. I remember the second meeting that you have just read about where I was elected permanent secretary and Mr. O'Connell was elected permanent president. I cannot remember if the Smith boys were there; they might have been; it seems to me that one was present, the taller of the two."

"The minutes of the American Patriots were thereupon introduced in evidence as Government's Exhibit #26 (Original exhibit to be transmitted to the Supreme Court pursuant to stipulation.)

138 Thereafter, the witness resumed her testimony as follows: I sent one piece of literature to my son in Yosemite; I never assisted in sending out literature; I never saw a purported mailing list. The latter part of July I ceased going to the meetings altogether. I had resigned at the meeting of the election of the officers but I was prevailed upon to come down. I didn't wish to be further connected with it. I cannot just recall when and what article it was or what paper it was in, I then insisted on my resignation taking effect.

Cross-examination.

By Mr. O'Connell:

I was one of the original defendants in this case charged with conspiracy, and I came in answer to the warrant and gave bail. After that the case was dismissed against me. I never saw Mr. O'Connell until the day Mr. Yost introduced me to Mr. O'Connell and that was the day before the preliminary meeting referred to. I did not know that there was to — such a meeting until I was told when I was called at the office of Mr. Yost; the meeting was for the next evening. I don't remember whether Mr. Manley and myself expressed our objection to the draft law when we first saw Mr. O'Connell. I have one son liable in the draft law. I did say to Mr. O'Connell that he may not be accepted because he has flat feet; that statement fitted in most likely to Mr. O'Connell's remark. I went to the meeting at which Mr. Yost spoke in the Dreamland Rink, several nights before this time, and came down to Mr. Yost'- office with Mrs. Manley of my own volition to get the address of Miss Whitney, of the Peace Council. I had never seen Mr. Yost before that meeting at the Dreamland Rink and never spoke to him before I came down to his office. I remained passive at the meeting at which Mr. Yost spoke. I was temporarily residing in San Fran-

cisco at the time but owned a home down San Mateo where I had lived for 11 years, and I am living in the same house today. I resided in San Francisco only three months, but my real home was in San Mateo, and I told Mr. O'Connell that my home was in
139 San Mateo where Mrs. Manley's home was. Mrs. Manley came up from San Mateo to attend the meeting. I said nothing at the meeting; I was a member of the Democratic State Committee of this State, and one — the Democrat electors at the President election and took an active part in the campaign for the election of Mr. Wilson as President. All my life I have been a pacifist. The first meeting was more of — social meeting, and Mr. O'Connell explained the objects of the organization, and universal suffrage appealed to me strongly; and Mr. O'Connell said we have it here, and that a California corporation could not have universal suffrage because we already have it, but it could be added later. I was under the impression that that was one of the main reasons why the corporation was being organized for organizing the corporation was to work for the repeal of the draft law, and to amend the constitution so that the war could not be declared hereafter without first giving the voters a chance to vote on it, and that appealed to me; and its constitutionality or unconstitutionality was to be tested in the courts. I think Mr. O'Connell said that a proposition to amend the constitution was to be submitted to the Legislatures of the various states. I first prepared the first minutes of the corporation, that was the end of my secretaryship. I pasted the circular letter the same as the Government Exhibit No. 6 on the cover of the minutes; all the hand writing under the typewritten sheet is mine, I didn't write anything after that everything I wrote is on one page, of the minutes are mine. The article I refer to was published the next morning after the articles were filed in the County Clerk's office before the charter was issued at Sacramento. It was in the Chronicle and simply quoted the purpose of the corporation and no more. After that article was published Mrs. Manley phoned to me and referred to what she saw in the "Chronicle," and said her husband didn't like her name being signed as one of the incorporat*ions*. She never told me before that time that she did not want to belong to the organization.
140 She earnestly requested me to sign her name, and it was a great injustice to me for — to say that it was done without her authority; she was a strong factor in the organizing of the corporation and came up from San Mateo for that purpose, going back on the 10 o'clock train that night. At the first meeting Herman B. Smith was there and made some remarks there. There were two or three dozen people present, there may have been 30 or 40; I saw a lot of gray-headed men and bald-headed men there and I thought it was conspicuous by the absence of the draft age men. *I*t that meeting after the charter was issued David J. Smith, Mr. O'Connell and myself were there also Herman B. Smith. At that meeting a large number of people came forward and signed the roll, and they fixed the dues themselves that night at 25¢. This was the meeting after we knew that the papers had been filed at Sacramento and after we were incorporated. Everybody came forward that night and

signed the roll; and a man named Bovill, who somebody said that night was a secret service man, came forward and signed the roll, and Mr. O'Connell said he did not care; I think Mr. O'Connell said he did not care. At the next meeting the officers were elected; I cannot tell how many people were present at the meeting the meeting was pretty well patronized I think that the taller of the Smith boys Herman B. Smith was present and I remember David J. Smith saying that 25¢ would not pay expenses. After that meeting headquarters were opened at room 714 Mechanics Building, I never saw Henry B. Lister, the notary public. I was never down in his office. At the meeting Mr. O'Connell was requested several times to state the objects and purposes of the corporation. I had been ill for a year or more and all this prosecution has accentuated my memory, it seems a long time since the American Patriots Affair and I have forgotten much about the American Patriots affair, and I had
141 a nervous breakdown since the complaint was filed against me. At the night when I was elected Secretary I said my health would not allow me to act but Mr. O'Connell wishing me to continue, said that it added prestige to the office.

A. D. BAUER was duly sworn and testified as follows:

Direct examination.

By Mr. Preston:

I am not a citizen of the United States; am a subject of Germany living in San Francisco at the present time; I know the defendant Daniel O'Connell; I have known him in an organization known as the American Independent Union; it is a corporation I think it was subsequently incorporated but I am not sure; I edited a paper in which Mr. O'Connell was interested; the name of the paper was "The American Independent" and was published by the American Independent Publishing Company the first issue came out about December 1915 and I was the first editor until the fall of 1916; Mr. O'Connell was one of the main stockholders; while I was there Mr. O'Connell wrote some of the editorials and I wrote some; I think I could tell from the files of the papers which I wrote and which he wrote; and Mr. Serbin would be the real secretary. After that headquarters were opened at 714 Mechanics Building, and I went to the headquarters occasionally. I never sent out a circular from that office; I don't think I was there more than three times. I don't remember that I was there on the day the warrant was issued for my arrest; I saw Mrs. Manley after she had been arrested, and when she was down before the Commissioner as a defendant in the case, and simply said "How do you do"; I had no further conversation. I never saw Mr. Yost before that night at the Dreamland Rink.

Redirect examination.

By Mr. Preston:

Afterwards, when I called at his office, he brought me into
142 Mr. O'Connell's office; I never saw Mr. O'Connell before, the American Patriots were not organized at that time. I never spoke to the United States Attorney before I was subpœnoed in this case but my son spoke to him about the case. My son wrote me a letter about the organization which helped to make my nervous condition worse, when I was arrested I collapsed, and I gave bail in the sum of 2,500.00 dollars. The United States Attorney thereupon offered in evidence four unsealed envelopes containing circulars the same as the Government Exhibit No. 2 which envelope- bore the return address — defendant O'Connell and had been returned to the sender by the Post Office Department. They were admitted in evidence as Government Exhibit No. 27 (Original to be transmitted to Supreme Court pursuant to stipulation).

"Mr. O'Connell: Very well my motion is in writing but I want to argue it. I will hand it to your honor so that you can follow me. The first motion is to strike *not* the evidence composed of the Socialist Party Circulars, and all the evidence of the seizing of those circulars at the time they were seized, sometime in June. I think it was, or on July 2d *July 2d* I think it was. The second motion is to strike out all the evidence——

The Court: What is this I have here?

Mr. O'Connell: That is a motion to quash the indictment. I am making some preliminary motions now.

Thereupon the defendant made the following motions; the court made the following rulings, and denied the motions, and the defendants saved exceptions thereto as follows:

Exceptions No. 6.

The Court: Mr. O'Connell, this charge is conspiracy to do what? To obstruct the execution of the so-called draft act. As I had occasion to remark this morning, obstruction means any method
143 of procedure which might either directly or indirectly tend to an obstruction of the execution of the law; in other words, anything which would be calculated to bring about and produce a state of mind in the public with reference to this act which would be calculated to result in anyone subject to its provisions being deterred from acquiescing in its requirements, subscribing to them, would be a pertinent matter to go before the jury as tending to show what the purpose of the defendants was in anything they did. Now it is not at all essential that any means employed by any one of the defendants if there was a conspiracy, which is for the jury to find, it is not at all material from what source any of the propaganda or means that might be disseminated by defendants among the public for such purpose would come. It might be literature produced by

an organization in Europe as to which the defendants so far as they were concerned had never had any knowledge as to its organization, much less being members of it, and yet if they availed themselves of the emanations from a source of that kind, which by reason of its character was calculated to further their ends, if they were using it and disseminating it, or were on the point of doing so, it is entirely competent as evidence in view of the nature of this charge. The evidence in this case it seems to me does sufficiently disclose this to enable it to go to the jury. I do not pass upon the weight of the evidence at all, I pass upon its admissibility, its relevance to the issue, and I am bound to leave the weight that it shall be accorded in the great sum of evidence, to the jury; but it seems to me that under the evidence in this case, if there be found, and I think there was read matter from this exhibit which, as I suggested a moment ago might be or would be calculated to influence the minds of people to whom it was distributed, which would induce them, if responsible to this Draft Act, to refuse to conform to it and so far as lay in their power to resist its execution, I don't
144 see why it would not be admissible.

Mr. O'Connell: If it is connected, if your Honor please.

The Court: That is just what I have passed upon. I think the evidence here is sufficient to connect it. One of the defendants, it was very clearly shown,—I am talking about what the evidence tends to show, because the jury will find out whether it is shown but if it — not shown to their satisfaction that he had to do with it, then of course they will disregard it: but for the purposes of a motion of this mind, if there is evidence which tends to show that one of the defendants during the existence of the conspiracy, if the jury shall find that one was in existence, had to do with the literature of this kind for the purpose of aiding or assisting in its distribution, or independently for himself, distributed it, and it was of a character that might further the purposes alleged to have been the object of the conspiracy, it is perfectly competent.

Mr. O'Connell: My objection of course, was that it had not been connected.

The Court: Just recall the evidence on the subject. The hotel keeper testified to facts which if the jury believe it would be sufficient to connect the defendant David Jay Smith with this literature. That makes it competent to go before the jury for their consideration. I will overrule that motion and give you the benefit of an exception.

Mr. O'Connell: Now the second motion is to strike out all the evidence of the speech of Herman B. Smith at the meeting on July 3d at the Dreamland Rink, I put that on the ground that it has not been connected with other defendants, and on this ground, the evidence is that that was a meeting which started with a petition for congress as to certain redresses on the *appeal* of the Conscript Law and so on and therefore anything that was done at that meeting was under the protection of the law and is under the protec-
145 tion of the State of California. It was not a thing within the perisdiction of the United States or covered by any law

of the United States; it was within the jurisdiction of the laws of the State of California and the Constitution of the State of California which is the law governing peaceable assemblage and the right of free speech and the right of free press, those subject- being prohibited from any legislation on the part of Congress.

Exception No. 7.

The Court: It does not make a particle of difference whether what has been shown here to have been said by Herman B. Smith on that occasion was expressly authorized by the laws of California. The question here is and the only question is whether or not those utterances were in keeping with what the Government claims to have been a fact here, a propaganda or a method or procedure and utterance with reference to this law which was calculated to and which was intended to *instruct* its execution. It might well be or might possibly be something that would be found in the statute of the States or in the Constitution of the state. If the use made of it by one engaged in such an enterprise was *much* as to give it a place in the sum and substance of evidence tending to show that there was being carried on a purpose to obstruct a federal statute the fact that it was a part of the law of the state would not in any way, shape or manner affect its admissibility. The fact that they were protected in that meeting from any prosecution by the state could not *extent* affect the question of either the admissibility of the evidence or its effect here when considered for the purposes of a prosecution of this kind. Doesn't that appeal to you as such.

Mr. O'Connell: To be frank with your Honor, it does not.

The Court: The fact is that was not a fair question because it is directly in accord with your theory. However that is the
146 view that I entertain. The motion to strike out that evidence will have to be denied.

Exception 8.

He had a perfect right to express his opinion, Mr. O'Connell, so far as it was necessary to raise the question that he had in his mind ostensibly, that is, to raise the question of the unconstitutionality of that act; he had absolutely no right under the limitations of free speech to utter language which was calculated or intended to produce in the public a sentiment of hostility and a disposition to obstruct the execution of that law. None of the defendants had that right. They have a perfect right to criticize as I said the other day, and to criticize freely, but they have no right under the doctrine of free speech to give utterance to sentiments or to do acts which will obstruct or prevent the execution of a law on the statute books. Now that does not mean that they can not question the constitutionality of it at all, because as I said the other day they may do so, but they must, as I shall eventually instruct the jury, not transcend the right of free speech to an extent which will enable the

jury to say that its affect was to obstruct the execution of law. There are perfectly well and thoroughly established methods provided by our laws for the contesting of the validity of any law, of any act, and one has a right to pursue those; but in that pursuit he must refrain from doing things which extend beyond his rights and affect the rights of the government to have all individuals within the draft age subscribe to it. I don't like to be called upon, Mr. O'Connell, to review in detail this evidence it might have some prejudicial effect upon your case and I don't want to do that; I would suggest that you state in a general way what your grounds of motion are as to all the evidence and without taking it up in detail I will pass upon the question whether in my judgment there is evidence here which
147 would preclude me from taking the case from the jury because of the fact that in its legal tendancy it would if believed by the jury be sufficient to sustain a conviction of these defendants. Now, I watch a case, as perhaps you have observed very closely; very little evidence has gone in here that I could not give you the substance of; I am perfectly satisfied at this time Mr. O'Connell, and it is enough to say that without giving you my reasons because they might effect the minds of the jury—and it is for the jury to pass upon the truth of the evidence, not the Court. I simply regulate the trial, I simply admit what in my judgment is evidence pertinent to the issues presented in a competent form; that is all I rule on, the legal aspects of the offer. The weight that is to be accorded to any item of evidence, unless it is something I can instruct the jury is to verity which cannot be contradicted, is for them; I do not pass on that. I am perfectly satisfied, and I don't think that argument could change my view, that there is evidence in the case which I would be bound to say to this jury, if they believed it to the extent that I shall instruct they must believe it, in order to base a verdict upon it, that would justify them in finding the averments of the indictment true.

You can file your motion in detail and I think it would be less complicated the case of the defendants, for you not to go over in detail your specifications here and commend upon them.

Mr. O'Connell: Your Honor will consider them as present?

The Court: Yes.

Mr. O'Connell: May I make just one observation now?

The Court: There is one suggestion you made that perhaps I should notice because its legal aspect the jury might not understand. The indictment does charge a conspiracy to do certain things. To accomplish a certain purpose, and it does undertake to specify certain things that were done to that end; now, among those there is one you
148 mentioned, as to which there is absolutely no evidence in the case, as you suggest, and that is, of any effort being made on the part of any of the defendants to induce men not to register; the answer to that is that in alleging the sum and substance of the circumstances which are relied upon as tending to the conclusion alleged in the indictment, many things are alleged which by reason of the fact that they do not become material need not be proven and yet the charge in its substance be established; for instance, that is but one

thing that is charged to have been done, one element of dissuasion that is *relief* upon by the Government as tending to obstruct this law, that is, that they have advised and induced people who were subject to the law to refrain from registering and to refrain from taking physical examination, etc. It is not incumbent upon the Government to prove all of those specifically; it is not incumbent upon the Government to prove that anybody was induced not to register; if taking the sum of the evidence together it is sufficiently proven to the mind of this jury that what has been shown to have been done would in itself have obstructed the execution of this law, that is sufficient to entitle the case to go to the jury. That is all that is necessary. Where a number of facts are alleged like that—it is like the averment in an indictment of a series of overt acts, which it is essential in our law of conspiracy that they be alleged, in other words, conspiracy with us is not conspiracy as it was at the common law, you cannot be held to answer for simply having entered into conspiracy; while that is the gist of the offense of conspiracy it must be completed by having committed some one or more overt acts. It is the habit and a very proper habit, a proper method of criminal pleading to insert as many overt acts as are brought to the attention of the Grand Jury; now the Government need not prove all those; it is only required to prove one. If it establishes the conspiracy, the unlawful combination, and if it shows that one act was done by one individual a party to the
149 conspiracy to carry it into effect it is just exactly as potent for the purpose of a conviction as though they were to prove them all. Now, it is exactly so with the other circumstances which are alleged as having been done to bring about an obstruction of this act; the fact that it is alleged that among other things they sought to deter men from registering, and there is a failure to establish the fact, that does not militate against the sufficiency of the evidence under the entire charge if nevertheless there are sufficient facts shown to satisfy the jury that there was a conspiracy and that other acts were done which were intended to and did obstruct the execution of this act.

Mr. O'Connell: When they alleged, knowingly and wilfully—which of course is necessary to aver—to obstruct, etc., that is, to those who know that the act performed will have that effect, and that they performed them with the intention that such shall be their operation.

The Court: That is undoubtedly true. Of course, you are well aware that the term "knowingly" in the criminal law simply means intentionally, wilfully; that they did an act conscious they were doing it, and that its effect might be to produce the result charged as having been produced. The jury are to determine from all the evidence whether a defendant was aware of the consequences of his act. Of course, if a man commits an act which is unlawful the plea of want of knowledge on his part is no defense to a prosecution for the commission of that offense. We all know that ignorance of the law does not excuse. The evidence of specific knowledge can only go to the question of motive on his part in doing the act. The act itself is a criminal thing. A man might murder his neighbor and say that he was not aware that what he did would result in the death of

150 anybody; he might claim that he was not aware that there was any such crime as murder, or that he was not aware that it was unlawful for one to take the life of another. That is no defense to crime.

Mr. O'Connel: The indictment charges that they conspired to obstruct by inducing and persuading. The point I wish to advance now is that Congress could not have intended that inducing and persuading was obstructing, or that obstruction could come about in that way because if that were true then a wife and children who might induce and persuade the father from enlisting would be guilty of obstructing the enlistment and recruiting. In the same way with brothers and sisters, they might induce or persuade some member of a family not to enlist. Therefore if that is true they would be guilty of obstructing.

The Court: Is that any argument against the validity of the Act?

Mr. O'Connell: Of the indictment. The act does not say inducing and persuading.

The Court: But is that any criticism of the language of the indictment?

Mr. O'Connell: Yes, that is what I advance it for.

The Court: You are confusing what might present itself as a practical obstruction to the conviction of people, the relationship of certain people who might be induced to commit the act with the question of the rightfulness of that course of conduct. The Act is very sweeping. I think it says, "everyone."

Mr. O'Connell: I think it says "whoever."

The Court: Yes, whoever wilfully obstructs the execution of the act. That means anybody. It is not at all inconceivable, while I doubt if any prosecuting officer would think it was worth while to prosecute, but it is not at all inconceivable that a wife or a family of children might be guilty under that act. The practical
151 difficulty would be in getting a jury to convict them because of the relationship and that sentimental equation which of course affects us all more or less; but it does not militate against the construction that *it* is to be put upon the language of that Act at all. It includes everybody who does those things. A wife might do it,—unless perhaps there is something growing out of the relationship which the Court would hold would prevent her from being responsible for such an act. I don't think there is anything in that objection at all.

Mr. O'Connell: Very well. Without delaying any longer may I ask your Honor to consider Section 6; that is the section under which the second count, Section 6 of the Act of May 18th, and see if that section does not apply to some officer or person who has something to do with carrying out the act itself.

The Court: Unless the jury finds there were acts done which meet the requirements, Mr. O'Connell, then the defendants are bound to go Scot free.

Mr. O'Connell: Then it is all up to the jury.

The Court: It is up to the jury so far as determining the matter finally. The Court instructs them as to the legal tendency of the

evidence in admitting it because it is the duty of the Court if the evidence offered has no legal tendency to establish the charge in an indictment to exclude it; therefore any evidence that the Court permits to go before the jury they are to understand is for their consideration as to its legal tendency to make out the charge; but as to its weight, as to the degree of credibility they will accord the statement of a witness, or the degree of weight they will accord to a paper or other thing, independently of its legal significance, is for them entirely; with that the Court has nothing to do whatsoever.

Mr. O'Connell: I would like to cite to your Honor the following cases: Brown vs. United States, 150 U. S. 93-98; Sparf vs.
152 United States, 156 U. S. 51; Lagan vs. United States, 144 U. S. 263-309.

The Court: What is the point?

Mr. O'Connell: Acts and declarations to show the conspiracy must be direct and not be inference; that they cannot be considered by inference but must be direct. And also on this proposition, that it is not sufficient that it was the joint act of the defendants but must have been pursuant to a previous conspiracy.

The Court: Proceed with the evidence.

Mr. O'Connell: I desire to save an exception to the overruling of all our motions.

The Court: Very well.

Exception No. 9.

The defendants' motion to quash the indictment or direct a verdict of not guilty was as follows:

153 In the Southern Division of the United States District Court for the Northern District of California, First Division.

Division No. 1.

No. 6220.

THE UNITED STATES

vs.

DANIEL O'CONNELL et als.

Motion to Quash Indictment or Direct Verdict of Not Guilty.

Now come the defendants at the close of all the evidence offered for the government in the above entitled cause and before the offer of any evidence on the part of the defendants and move this Honorable Court to order and direct a verdict of not guilty. This motion is based upon the following among other grounds:

1. All the evidence for the government if assumed true in fact together with all reasonable inferences therefrom is not legally sufficient to support a verdict of guilty.

2. The allegations and facts as set forth in the indictment, and in each of the first and second counts of the indictment, are not sufficient to constitute an offense under the constitution and laws of the United States for each and all of the specific grounds and reasons set forth in the demurrer of the defendants to the said indictment and counts which demurrer has been heretofore filed and overruled and which is hereby referred to and made a part of this motion.

3. No evidence has been offered to prove the first count of the indictment because proof of "inducing and persuading," as alleged in this count could not prove "obstructing" as alleged in that first count or in the statute because:

A. It is repugnant to itself in that the conspiracy charged is that of "knowingly and wilfully obstructing the recruiting and
154 enlistment service" meaning by that, "that it is to say," the "persuading and inducing" certain persons not to do certain things alleged, which necessarily means mental consent and assent, and "obstructing" does not, and cannot mean that.

B. "Obstructing," necessarily means and includes, by force, or violence, or threats, or physical resistance; all of which are contradictory of, and inconsistent with, the words, and meaning of the words, "persuading and inducing."

C. Proof of "inducing and persuading" as alleged in the first Count of the indictment could not prove "obstructing" as contained in the statute, and therefore could not prove the crime set out in the statute, or indictment.

D. It is inconsistent with, and repugnant to the well settled meaning of the word "Obstruct" as defined in the dictionaries as follows:

"To block or stop up; to close; to bar; to be in the way of; to prevent; to impede; to oppose; to retard; to hinder." (Worcester's Dictionary.)

"To fill with impediments so as to prevent passage either wholly or in part; block or stop up; close by the interposition of obstacles." "To hinder or prevent from progress; check; stop; also used to retard the progress of; make the accomplishment of difficult and slow." (Standard Dictionary.)

"To block up; to stop up or close as a way, to place an obstacle in, or fill with obstacles or impediments to passing. To be or come in the way of; to hinder from passing, action, or operation; to stop, impede, retard." (Webster's Dictionary.)

E. It is inconsistent with, and repugnant to, the well settled meaning of the word "obstruct" as determined by the Courts as follows:

Resistance is opposing force to force, not retreating from force. Bouvier. State vs. Welch, 37 Wis. 196, 201. It is incon-
155 sistent with mental consent or assent no matter how procured.

"To obstruct would seem to stand ex vi termini a direct and positive interposition, which prevented or tended to prevent the action of the officer in respect to a matter then to be proceeded in."

U. S. vs. Seeley 27 Fed. Cases page 1013.

U. S. vs. Carroll 147 Fed. 953.

"Persuading and inducing" or attempting to "persuade and induce" (by bribery or otherwise,) is not "obstructing," and cannot be obstructing within the meaning of the Act of June 15, 1917.

U. S. vs. Carroll 147 Fed. 953.

F. It is inconsistent with, and repugnant to, the meaning placed by Congress and the Courts on the same words used in the Draft Act of March 3, 1863;

12 Stats. 731 and the Supplementary Act of Feb. 24, 1864; 13 Stats. 6, which the Supreme Court (U. S. vs. Scott, 3 Wall. 642) declared was a legislative interpretation of the previous act. Section 1e of the previous Act makes it a crime for any person to "assault or obstruct any officer in making such draft or in performance of any service in relation thereto." Section 12 of the Second Act makes it a crime to "forcibly resist or oppose any enrollment * * * or who shall assault, obstruct, hinder, impede, or threaten any officer or other person employed in making or in aiding to make such enrollment." Again in the same sentence it describes the offense as "assaulting, obstructing, hindering or impeding."

G. It is inconsistent with, and repugnant to, the interpretation of these Acts given by Mr. Justice Miller in U. S. vs. McKay, Woolworth's C. C. Reports P. 128, 134, 135, that it must be obstruction by resistance to an officer actually engaged in the work or service, and the guilty party must be moved by some motive having rela-
156 tion to the service in which the par.y obstructed is engaged."

In the case at bar it must be obstructing some officer while actually engaged in recruiting and enlistment and while they were so engaged. It must not be casual or incidental but an intentional designedly obstructing, prompted by some motive which had relation to the recruiting and enlistment with which the particular officers obstructed were engaged in and done with this motive and sentiment and purpose.

H. "Induce" or "persuade" antonyms to "obstruct," or "resist." One is repugnant to the other. One is done without, and against, the consent; and the other is by securing full consent. "Obstruct," is opposing will to will and purpose to purpose. Induced or persuaded is after all opposition is gone so that the act is the one will, and with no opposition, or resistance; all carrying out the one purpose.

I. It is inconsistent with, and repugnant to, the meaning intended by Congress. Congress never intended that "wilfully obstruct" in the Act of June 15, 1917, should mean "induce or persuade" because the punishment is a fine of not more than $10,000, or imprisonment for not more than twenty years or both, and a wife and children could be convicted of inducing and persuading the husband and father not to enlist; or the sister or daughter not to enlist as proficed by law for the enlistment of women in the Navy as Yoewomen; or the sisters or brothers could be convicted of inducing and persuading the brother, or the sister, not to enlist or be recruited. This would follow as the inexorable effect of the law if the word "obstruct" included, or was intended to include "induce or persuade."

J. Congress is presumed to have intended not to go behond its

powers. Inducing and persuading can only be accomplished by speaking or printing or peaceable assemblings where both speaking and writing can be used. Congress has no power to abridge
157 freedom of speech or press or the right of assembly and is expressly forbidden to do any legislating that would abridge any of these three rights. Therefore Congress never intended to make inducing or persuading a crime in these cases as that would abridge the freedom of speech, press, and assembly. K. Congress knew that it could not do *that* indirectly that which it is forbidden to do directly. The constitutionality of a law is judged by its effect and operation. To make the inducement and persuading of friends or others not to enlist a felony, would have the effect of preventing people talking, or writing, or expressing their opinions, or wishes, on the subject, and to make it a conspiracy for two or more to do so, would abridge and prevent peaceable assembly. Therefore, if Congress so intended, then that law, or that much of it, would be unconstitutional and void, and therefore inducing and persuading could not be, and would not be, any part of the meaning of the word "obstruct" in the Act, and allegations of "inducing and persuading" could not, and would not, state the crime of "obstructing."

L. The Congress knew that the United States having been forbidden to Legislate on the subject of free speech, free press and peaceable assembly, or to abridge the people's freedom in each, that therefore full and supreme power over these subjects remained in the several states and Congress could not, and cannot, in the slightest degree, interfere with the states, or the states' laws, on the subject, and therefore in using the word "obstruct" never intended that they should include, or mean, "induce and persuade".

M. The Congress knew that the State of California had completely covered these subjects in the Constitution of the State which law is beyond the power of the United States to interfere with in the slightest degree, and if the word "obstruct" were construed to mean "induce and persuade" then they would interfere with the following provisions of the said Constitution of the State of California:
158 "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." Sec. 9, Art. I. Const. of Cal.

"The people shall have the right to freely assemble together to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances." Sec. 10, Art. I. Const. of Cal. See People vs. Seeley 139 Cal. 118; Daily vs. Superior Court 112 Cal. 94."

Section 2 Art. I, Const. of Cala.
Section 1 Art. 1, Const. of Cala.

Therefore the Congress never intended to interfere with these expressions of the Constitution of California and if they did their attempt would be void and of no effect.

N. The Congress never intended to make, as it had no power to make and was also prohibited by the Constitution of the United

States from making, the "persuading and inducing" as alleged in the indictment, a criminal offence; and the offering evidence of such "persuading and inducing" could not prove, or tend to prove, the crime alleged in the indictment, and the allegations of inducing and persuading are repugnant to the other parts of the indictment as well as the statute.

O. The subject matter of "persuading and inducing" was and is entirely in the jurisdiction of the State of California and the State of California has acted thereon in the Constitution of the State; and the Congress of the United States could not legislate upon the subject. They did not intend to and this is more repugnant.

P. To hold that such allegations constitute a crime would be contradictory of and violate the provisions of Sections 1, 9, and 10, of Article I of the Constitution of the State of California which is the supreme law on the subject. This is a further reason for the said claim of repugnance.

159 4. There was no evidence offered or admitted of any conspiracy charged in either the first or second count of the indictment.

5. None of the acts charged as overt acts were proved as overt acts in pursuance of any conspiracy charged in either count of the indictment.

6. The strongest construction of the evidence against the defendants could not make such evidence any more than an agreement and understanding between persons to test the constitutionality of the draft act or acts of the legislative or executive departments of the government, which agreement or understanding could not be an offense against the United States, and it is also protected by Section 37 of the Penal Code of the United States.

7. Such an agreement or understanding could not possibly be construed into an obstruction or conspiracy to obstruct or to evade any law of the United States.

8. All the evidence offered is *off* circulars and other printed matter circulating among the people and also of speeches at public assembly-s in which acts of the legislative and executive departments of the government were considered and conversations between attorney and clients on constitutional and other legal questions and on advice as to the best method of protecting the legal rights of the client, especially his property, liberty and life from what he considered unauthorized acts of officers of the government, and also conversations between the President of a corporation and the members of the corporation on the same subject and for the same purposes, and Congress has no power to legislate on such subjects and is also prohibited from abridging the rights of peaceable assembly, free speech and free press and cannot indirectly or by construction do that which it has no power to do and is directly forbidden to do.

9. The State of California, in its Constitution has fully legislated on these subjects of assembly, speech and the press and has
160 supreme, plenary and exclusive power to legislate on these subjects. The conspiracies charged in the indictment require

that the defendants must commit an offense which could be carried into effect only by violating the laws of the United States.

Wilson vs. U. S. 190 Fed. 427.
Fain vs. U. S. 209 Fed. 525.
U. S. vs. Biggs 211 U. S. 507.

Only the laws of the State of California could be violated by anything done in peaceable assembly or by way of speech or of the press.

10. There is no evidence whatever of "the making of any false statement or certificate as to the fitness or liability" of any of the defendants or of any other person for service under the provisions of the Act of Congress of May 18, 1917, or regulations made by the President.

11. There is no evidence of "the union of two or more persons, the conscious participation of two or more minds, which is indispensible to the conspiracy." The evidence is only of facts as consistent with innocence as with guilt. There is no substantial evidence of facts which exclude every other hypothesis but that of guilt; all the substantial evidence is as consistent with innocence as with guilt.

Union Pacific vs. U. S. 173 Fed. 740.

DANIEL O'CONNELL,
Attorney for Defendants.

Thereupon the defendants to maintain the issues on their part called the witnesses hereinafter named each of whom being duly sworn testified as follows:

161 *Evidence Offered by Defendants.*

MARGARET MALLOY KRAUS testified as follows:

Direct examination.

By Mr. O'Connell:

I was at Daniel O'Connell's office July 11, 1917 with Mrs. Manley, and Mrs. Manley and myself were introduced by Mr. Yost to Mr. O'Connell; there was a conversation at that time about the views of Mr. O'Connell upon the enlistment law and the draft law. Mr. O'Connell was very emphatic about every one registering; he said the government had a perfect right to take a census of the manhood of the country of military age; and that anyone who wanted to go to war should go; he said that he believed that the draft law was unconstitutional. At no time was anything said about obstructing enlistment. Mr. O'Connell thumped the desk and said that he believed that the Government had a perfect right to take the census of its men of military age. The subject of Mr. Yost's speech at Dreamland Rink was talked about and Mr. Yost gave a copy of it to Mrs. Manley.

Mr. Yost at the Dreamland Rink meeting made reference to the

constitutionality of the draft law. At the meeting in the Assembly hall of the Pacific Building Mr. O'Connell said that he thought the draft law was unconstitutional, and that there would be a test case made of the draft law, and it would come up in the Supreme Court, but that all should register and anybody who wanted to go to war they should go; he said it would be a great expense to take it to the Supreme Court of the United States, and would cost about $5,000.00; that it would be too great expense for one individual, but that by a great many contributing to the amount it would cover the expense; he said it was necessary to have an organization to get the money to meet that expense, and that was his idea in getting up the American Patriots, which was also intended as a political organization. He thought it would be an organization that would grow in great
162 numbers; I asked him how many he thought would join, and he said he would be disappointed if 20,000 didn't join he also dwelt on the proposition to amend the constitution so that no more war could be declared by 400 or 500 people without consulting 100,000,00- r ;le, and that would be a popular issue. At each of the subsequent meetings substantially the same opinion was expressed by Mr. O'Connell. I knew those were his sentiment-. I think I saw Mr. O'Connell at the headquarters in the Mechanics Building no more than twice.

Cross-examination.

By Mr. Preston:

He said he expected those 20,000 to join from San Francisco; he did not say anything about that a campaign was to be made among the drafted men. I thought it was to be a political organization, and that they were going to nominate congressmen and senators and district attorneys, and such. Every one was obliged to pay $5.00. I never heard Mr. O'Connell use the word "Evade." I think he said there would be a jail sentence under the draft act for the men while the case was being tried and while it was pending in the Supreme Court. It did not occur to me that if everybody took his advice or the American Patriots' advice there would be nobody to answer the draft.

D. A. SCANNELL was duly sworn and testified as follows:

Direct examination.

By Mr. O'Connell:

My place of business is at the corner of 29th and Sanchez Streets, San Francisco. I know Thomas Carey and John Murphy, they were in my place the latter part of July or sometime in August. Martin Conway was present; Thomas Carey was in there and John Murphy and Martin Conway came in together; and John Murphy was talking about being summoned to appear for examination or something to that effect; he was kind of kicking because he had to

go, he said he would like to fight for America, but not across *in*
waters; he was doing all the talking; he said he did
163 not want to go to France to fight, or something to that effect
and Carey turned around and looked at him—I don't think they had seen each other before, and Carey said, I got my summons too, but I got my case in the hands of a lawyer, I won't go over there to fight if I can help it. Murphy said, Will you show me the same lawyer, and Carey said, I will if you want me to, then they went out, and that afternoon I saw them together again. The first time was probably between 9 and 10 o'clock in the morning.

Cross-examination.

By Mr. Preston:

In the afternoon they passed the saloon together, that is McSweeney Brothers, I was the bartender on duty that day. I knew Murphy but a short time and Carey about six or seven months. I have not been friendly with Carey, we do not work together, I understand Carey is a longshoreman. I had no talk with him before that. Murphy brought the subject up, he was talking to Conway and myself, and was doing all the talking, and Carey turned around. Murphy was talking about — to Conway more than to anybody else, I was working up and down there. Murphy pulled out a card and said he was summoned to appear and that he didn't like to appear, and that he didn't like to go across the waters, but would like to fight anywhere in America, but not to go across the waters. That is all that was said by Murphy. Carey turned around and said, That's my case, but I have a lawyer hired to look after my case, I presume he did not want to go, and hired a lawyer to keep him from going, it looked that way to me. Murphy said, Could — get the same lawyer for me, and Carey said, If you wish to go to him you may; he did not say lead me to him. They all left my place immediately after the conversation. I did not discuss this matter with them any more. I saw them together that afternoon, but they were not in the saloon.

MARTIN CONWAY was duly sworn and testified as follows:

Direct examination.

By Mr. O'Connell:

164 I live at 485-30th St., San Francisco, Cal. I know John Murphy and Mr. Carey. I have known Carey about four and half or five years, and Murphy about two years. The latter part of July or early in August at McSweeny's saloon Carey and Murphy had a conversation. Murphy and myself got in about 9:30 in the morning and met Carey there, and we finally got all in a bunch talking; Murphy got speaking about the draft proposition and though he did not like it, he didn't want to go to Europe, he didn't want to join, and if he saw any way to get out of it, he was

going to get out. So Carey explained his case, what he intended to do, and Murphy said he liked the case very much and thought if he could get in it would suit him fine, so finally they talked along for a while and made an appointment to meet later on and we all got outside and I went home, and that was the last I saw of him. When I last saw them Mr. Carey went home and I went home, we left Murphy outside of McSweeney's door, that was about 9:30 in the morning. Murphy didn't say why he did not want to go to war, he said he didn't want to go, if he saw any way of getting out of it, he was going to get out. Something was said about the American Patriots; Carey said he belonged to it, and just what he thought he was going to do with it, but he would not induce Murphy to go into it, I forget the words he used, he seemed to like the American Patriots, Murphy thought he would like to go into the American Patriots, he wanted to know from Carey how he was going to get in, and where he was going to get in. Carey gave him O'Connell's card, or else he gave him a card with the address and then they made an appointment to meet at *eleven* o'clock that afternoon to go down there; whether they went, I don't know; I don't know what address was on the card, I think it was O'Connell's card; he said that Mr. O'Connell was the lawyer of this club. That is all I recollect that was said.

165 Cross-examination.

By Mr. Preston:

I am 32 years of age; not born here; have been a citizen about 3 years and know Murphy since he came to this country, about two and a half years. Murphy was not intoxicated neither was Carey; we had all told three drinks, one on the waterfront and two at McSweeney's, to my knowledge. I met Murphy at 6:30 and this conversation was at nine. Carey just said he belonged to the American Patriots. Murphy may have described his predicament and Carey may have said, "That's my case, and I have got a lawyer; but I did not pick up every word. I have not hear- Carey say much about the war or that he did not want to go to war. He didn't tell me that he had hired a lawyer, he said he belonged to this club and they had a lawyer. I cannot recollect all of the words passed. I didn't know anything about the American Patriots, it must have been Carey who first mentioned that there was such an organization. We were talking on the draft subject, and Carey was talling about the wagon going around Mission Street; that it was an ad. for the American Patriots, and about the driver of the wagon being arrested; he did not say what was on the wagon, he did not say why he was arrested; he said it was the American Patriots' wagon, and that he belonged to this club; he did not say how much it cost him; later on Murphy told me it cost him $5.00; Carey had not mentioned money at any time. It was because Murphy wanted to be introduced to O'Connell that Carey exhibited O'Connell's law card. Murphy said he wanted to join the American Patriots, I don't know what for. Probably for protection from the draft. We were talking about the

draft law. I said nothing, I had nothing to say, I was outside the draft. After talking on various subjects Murphy spoke about the draft and he said he didn't think it was right, he didn't want to join, he didn't want to be drafted; then it was that Carey spoke about his proposition. We talked quite a while before any of the three
163 of us mentioned the American Patriots. I intro- Carey to Murphy. I have worked stevedoring with Carey but not for quite a while. Murphy and I have been friends since he came to this country, and we used to work regularly together and I was with him all that morning.

EDGAR O. WALKER was duly sworn and testified as follows:

Direct examination.

By Mr. O'Connell:

I live at 2430 Bush Street, San Francisco, Cal. My business is a writer of short stories and scenarios; I attended some of the meetings of the American Patriots; I heard Daniel O'Connell speak on the subject of the purposes of the organization. The first meeting I attended, I believed, was the first after its incorporation. It was in the Assembly hall of the Pacific Building, the door was wide open, everybody was admitted, there was nobody at the door. I had cognizance of the meeting of the American Patriots, knew where it was to take place, and I went there and found the door open, and entered, not knowing anybody in the place, never met any of the people before. After a few minutes the meeting was called to order informally and Mr. O'Connell spoke to those present, saying that the organization of the American Patriots had been incorporated and those present had been invited to join as members of the organization. I cannot recall whether it was stated at that time what the precise purpose of the organization were, except that the circular letter which first came into my possession set forth the articles of incorporation of the American Patriots, and it was told us at that time that we were to become members of the organization to carry through what was set forth on the circular, not to contest the constitution, but to uphold the constitution of the United States. There may have been something said then about testing the constitutionality of the law, but I don't recollect it. One of these circulars was read at the meeting, the circulars were distributed; there was
167 a call for those present to come forward and take one; I had received a circular before I went there. I attended a meeting at Dreamland Rink at which Mrs. Skiffington spoke. In the foyer of the rink I was handed one of these circulars letters as I came out. Mr. O'Connell presided at the meeting of the American Patriots in the Pacific Building, and Miss Malley was acting secretary. One of those present requested that Mr. O'Connell speak more definitely concerning the corporation. Mr. O'Connell said those present were gathered together to perfect an organization which would be strong enough to carry on a fight in the *course* in testing the constitutionality of the draft law. Something was said on the subject of enlist-

ment or the duty to enlist; I cannot recall anything said on the subject of the draft. I have attended all of the meetings but one or two. Mr. O'Connell stated that the Government had a perfect right to cause to be registered either the young men *of* any other particular division of the people of the United States at any time, that it might be looked upon as a sort of a census; he stated that he thought it was perfectly proper at that time to register, and that they should register, although it was long past the date required for registration and that every man should present himself for physical examination, and present his claim of exemption at that time. That same statement was made at different times and in different speeches. Some of these meetings were in the Month of July. I was present at the meeting at which the officers were elected, and one or two meetings before. I can not recall whether these statements were made before or after the officers were elected, but I am sure these statements were made before the date set for the examination. Mr. O'Connell said that he believed that this draft law was unconstitutional, and that he believed it would be declared unconstitutional and void, and that this organization was formulated for the purpose of upholding the consti-tion and test the conscription law. I
168 remember that he quoted from Daniel Webster on the subject of the constitutionality of the law; he said it was the duty of any man who felt like enlisting to enlist, and that the editors of this gagged lying press should be made first to go to fight; also that it would cost a large sum of money to bring this case to the Supreme Court, where evidently it would go at some time. I think at least $5,000.00 was the sum mentioned. That the case would have to be handled by very able and competent lawyers in Washington. I never heard Mr. O'Connell use the word "obstructing."

Cross-examination.

By Mr. Preston.

I am thirty-three years of age, and joined the American Patriots at the first meeting; I am a director and third vice-president, but have not performed any duties as vice-president; I am cognizant of the internal affairs of the corporation. I have not been opposing the draft act; I have felt and do feel that the draft act is unconstitutional, and I am willing to lend my efforts to test it. Mr. O'Connell — not prosecuting any case to the Supreme Court that I know of he did not tell me that he had numerous opportunities to sue out a writ of habeas corpus to test this act. I knew of his defending people here in jail. I never asked Mr. O'Connell why he did not bring an injunction suit and enjoin some of these draft boards from performing their duty under the law; I did not ask him what advice he was giving about those who had been advised to report for military service, because I had heard him state without having to ask, that when a man was drafted he was to present his affidavit and take his examination; I did not ask him what the man should do after being examined and accepted and notified to appear. The reason that I

did not ask him was because the question never formed itself in my mind. I did not hear any young man ask Mr. O'Connell at any time whether he should report for military service after he had been found physically fit for service, and it never occurred to me to ask
169 such a question. Mr. O'Connell said that when a drafted man had been notified to appear for service he would be taken care of automatically through the fact of his having claimed exemption in there; that the military authorities would, in all probability arrest him, and that it would be necessary to have the young man turned over to the civil courts. I am not clear on those things, because my interest was aside, not being drafted myself. Supposing that one of the members of our corporation who had filed one of these applications for membership had been physically examined and found fit for military service, had been notified to appear for service, the corporation of which I am third vice-president would say to that man that he should stay; that he should not enter the military service. The purpose of the corporation is to secure not only those young men of draft age, but members of all ages. I would not say that *is* is a fact that it is the object of the corporation to get just as many members among the drafted men as they can, but it is a fact that they are conducting a campaign for the purpose of getting members, and they are being sought among the drafted men as well as any other place. One young man should refuse to report in order that they might make a test case of it. I cannot say what they were going to do with the others. I cannot say I am close enough in touch with the corporation to state what its purpose is as to how drafted members shall conduct themselves in regard to answering the call; my position is more or less honorary, and I am not in touch with the legal end of it and with all the objects of the corporation. It is my understanding that the corporation is formed, not to prevent anybody from being drafted, but for the purpose of finding out whether they can be drafted or not, whether thy can be made to enter the military service of the United States and go across the water. It would apparently be rather invidious, supposing we had 15 or 50 or 100 young men that were all eligible to
170 make a test on, to select one and let the others go, but these cases happen consecutively, one may present himself as a volunteer to do a certain piece of work before 15 others who are in the same class would do so; whether it was the intention of the corporation to take such a young man and have him as the young man to be the crux of the situation, I cannot say. I cannot say how, *is* we have 50 men who have paid $5 a piece, and joined the corporation, and who are all eligible under the terms of the draft, we could refuse to bring a test case for each man.

I did not think that operating these wagons up and down the streets of San Francisco would have a deteriorating effect upon some of our young men who are required to serve the colors; I left that to be handled by those who were in the best position to know. I thought the wagon bearing the statement "John Bull is ruling and ruining our country" might have a bad effect upon the men of the draft age. I did not think the statement "Did Washington fight in

vain, the Constitution is in danger. Will you support and defend it?" would. I have views upon the subject of whether "John Bull is ruling and ruining our country", but I have not been preaching any such doctrine. I would not put it in those words.

Whether a young man unacquainted with the provisions of the constitution if told by a lawyer claiming to be a reputable lawyer, that "As the boards might have them take an oath or sign some paper putting them in the military service, the safest way is not to go", would feel warranted in refusing to answer the call to military service, would depend upon how much confidence the man reading the advice had in his lawyer. If he believed that the statement was correct the inevitable tendency would be not to obstruct the law, but to follow those instructions.

EDGAR C. WALKER further testified as follows:

I cannot state how many members — in the corporation except that I have heard here 121. I have no idea how many are
171 of draft age, and am not interested in any person of draft age. My business is that of a short story writer and a scenario writer and I live at 2430 Bush St. and have no relatives that I am interested in keeping out of the war. I did not see any of the wagons calling people to join the American Patriots traveling on the street. I saw one in a stable and all I saw on it was American Patriots. I knew that this wagon or the other one was being operated up and down the streets of San Francisco. I have not assailed the integrity of any of the public officials or members of Congress or the Senate; Mr. O'Connell did not tell me that he put those wagons out; I do not know who put them out; I saw the legal opinion; I don't know whether it is correct or not, I am not a constitutional lawyer myself. I do not think that the contents of that legal opinion is sufficient in itself to invite forceable resistance to the draft law. I know what is in the opinion. I don't think as an officer of this corporation that the only effect that would have on a young man of draft age would be to place his mind in such a condition that he would feel warranted in resisting the law even to the extent of force as this young man has been advised to go and report and take the physical examination. I don't think that that part of the opinion which reads "If they refuse to go are they under military law? They are not. Can the military authorities proceed against them? A. No." What can be done for such refusal to be conscripted?", has the inevitable tendency, or the inevitable tendency of such language as the above just read to me was to have the mind of the young man reading it to turn away from the law and turn in the direction where he would be in the proper frame of mind to resist it. I don't believe that this is a sinister attempt to place the information in the mind of the draft man so that he will be led to refuse to answer the notice to come to military service. I believe that it is calculated to
172 to give such a man, the man in question, confidence in this organization. It is not calculated, in my opinion, to stay his hand, to steady his nerve to resist the law. It is calculated to give him confidence in the organization with which he has identified

himself. I know of a man in the American Patriots that has a constitutional mind—that is, sufficient warrant to express an opinion on the constitutionality of this law. I have not studied the constitution thoroughly, but I know in a general way what it is. I am not a lawyer. As I understood the question the United States Attorney asked me if there was anybody I knew who understood the constitution well enough to express an opinion on it. I did not mean legal opinion. I have read the cons itution—I have not studied it—and from what I have read I have gathered an opinion of my own; I did not know that in 1798 we had a conscript law passed in the United States. I did not know that we had one in 1863. I know we have had such laws.

Yes, I believe and my personal opinion is that under the previous circumstances, the conscription law was invalid. I believe there is good warrant for any court in this country declaring it unconstitutional. I have no knowledge of how many times the courts have declared it constitutional. I- has never been declared officially constitutional except by the passage of the act itself so far as I know anything about it. I do not know the purpose of inserting in that opinion the following language: "If the jury should find the defendants not guilty, then that ends it; if the jury should find them guilty then the case will be taken to the Supreme Court of the United States at Washington, D. C. on the question of the constit-ionality of the law; the case cannot be heard before December or January, and a decision may not be rendered until February, or March, 1918." I did not take the legal opinion to any attorney to ask whether or not it was the law, or do not know whether any member of the corporation did so.

173 Redirect examination.

By Mr. O'Connell:

I never knew or heard of any conscription law that was ever passed to send troops outside of the country. I have read extracts of the speech of Daniel Webster in Congress in 1814. In regard to the constitutionality of this act I based my opinion on well, I thought, first, it was in violation of the articles set forth in the preamble of the Constitution, and basing my opinion ma-nly on that, I thought that we should not be conscripted to be sent into a war of aggression; that the constitution states that it is made and written to provide for the common defense, to repel invasion. I have drawn my conclusions from that alone—not alone, but ma-nly. Another point was, which has not been clear in my mind, whether or not three-quarters of the legislatures of the states have ratified the decision of Congress—have ratified the conscription act, as I believe was necessary, that is to amend the constitution to include the conscription act, to have it constitutional. I mean this conscription act was an amendment to the constitution, and, such being the case, it was necessary for the legislatures of three-quarters of the states to ratify it. I have not read the speeches of Senators Cummings and other members of congress, including Senator Works, on the constitution-

ality of the act when it was before congress. I understood that this legal opinion that the United States Attorney has read was given in answer to certain questions put to Mr. O'Connell by Mr. Mengedoth and some others and that Mr. O'Connell was simply answering the questions that they put to him. I do not know that that opinion was circulated at all. I simply saw one at the office of the American Patriots. I do not know that any changes were made in it later, after rulings were made — General Crowder.

Recross-examination.

I cannot repeat the Constitution verbatim. It guarantees in substance to provide for the domestic defense, to promote do-
174 mestic tranquility, to repel invasion, and to put down insurrection. I construe that has something to do looking to the prohibition of sending troops abroad. If it was necessary to secure our liberties to send a couple of fellows across the ocean it would be all right, but in my opinion it is not necessary to do it. I understood from my reading of the constitution that all powers not conferred upon the congress or upon any of the departments by the constitution were reserved to the states and to the people.

Direct examination.

By Mr. O'Connell:

LOUIS SERBIN was duly sworn and testified as follows: I was 17 years of age on August 20th. I worked at one time in the office of the American Patriots. I was not even acquainted with Mr. O'Connell before July 3rd. That was the first time I saw him. I was at the preliminary meeting of the organization of the American Patriots and saw there Mrs. Manley, Mrs. Krause and about 25 other people, half old and half young people. There were speeches made as to the purposes of the proposed organization. Herman B. Smith was there, but David Lamar was not. None of the other defendants were there. Mr. O'Connell said the real purpose of the organization was to test the constitutionality of the draft act. That in his opinion it was unconstitutional. That all those who wanted to go to war should be made to go to war. That preachers who prayed for war should be made to go to war, and editors who wrote about war should be made to go to war. He also said that was should not be declared unless a referendum was taken so that the people could express their opinion whether they wanted war or did not want war. He said that because a few hundred men in Washington wanted war he did not think that the people should be forced to do their bidding without having something to say about it. He also wanted amendments to the constitution so that if an official should violate the constitution he should be recalled. He also invited reporters to come to the meeting and the doors were wide open and everybody was
175 welcome. There were not reporters at the meeting. Later on there was a reporter from the Daily News. I attended nearly every meeting until about the first of August when I left.

I was never a member but simply worked at the office for a while and newspaper reporters were invited to every meeting. At this point the United States Attorney said that he did not contend that there was any secrecy about any of the meetings. Mr. O'Connell said that a few men had come to his office previous to that evening and told him they were opposed to the draft act and wanted to test it, and he told them that they could not finance the contest because the expense would be too great for the individuals. That if they wanted to test it the best way was to organize a corporation and do it collectively so that all members could contribute to the general expense and that was what originated the idea of organizing the American Patriots. Something was said on the point of Mr. O'Connell being interested in having the law tested. Something was said about the discussions in Congress on the constitutionality of the law when it was passed and that the opinions of the Senators La Follette and Works were opposed to the draft. Mr. O'Connell read extracts from their speeches and at later meetings spoke about the speech of Daniel Webster on the subject. Mr. O'Connell said all those that wanted to enlist should be the first ones to enlist and those who weren't afraid to say that their souls were their own and who were opposed to war were welcome in the organization and could aid the general purpose of the organization to test the law, but Mr. O'Connell never advised anyone to obstruct the law. The second meeting was at the same place for the purpose of organizing the corporation. The papers were there to be signed by those who wished to do so. Those who wished to become members could sign. The charter had already been received from Sacramento. At this second meeting Herman and David Smith were there and the only other defendant
176 was Mr. O'Connell. Mrs. Krause was there and about 30 others. That was the first meeting after the receipt of the charter. Mr. O'Connell outlined the purpose of the corporation the same as at the first meeting. At the third meeting neither Herman nor David Smith were present. The only defendant present was Mr. O'Connell. Temporary officers were elected at the second meeting, being the meeting that the charter was received. Mr. O'Connell was elected president and Herman B. Smith was elected secretary pro tem. At the next meeting, which was the third meeting, Mr. Smith resigned. Mr. Krause or Mrs. Malloy was present at almost every meeting after the third. The headquarters were opened the latter part of July and I immediately went to work there. After a week or so members came up and assisted me. Mrs. Malloy was there at least three times a week. She directed me what was to be done and I obeyed her orders. The day Mr. O'Connell was arrested at the People's Conference meeting Mrs. Malloy was at the head-quarters. She usually stayed a few hours and some times a half a day or longer at headquarters. Her little girl also assisted. Circulars were sent out to some addresses. Mr. O'Connell never sent out any. They were all sent out at headquarters. Government Exhibit 11, is the kind of circular that was sent out. They were sent out by Mrs. Malloy, the little girl, myself and later the defendant Wacher. I sent them out to certain addresses given to

me and in envelopes which I found at Mr. O'Connell's office and thought it would save the funds of the organization if I used them. They were marked on the outside 937 Pacific Building but Mr. O'Connell's address was 943 Pacific Building. There were several boxes of these envelopes unused and hand not been opened, and I took them myself and used them. I saw the legal opinion which was presented to me by Mr. O'Connell for the benefit of members that came up to the headquarters. I kept it in the desk and sometimes I offered it to members and sometimes I did not and
177 when they read it I put it back in the desk again. Mr. O'Connell had instructed me to send anybody who wanted legal advice on the subject to him. Mrs. Malloy gave the instructions about sending out the circulars to a list which she gave me. I also sent out notices *to* the meetings only to the members. At the first meeting Mrs. Manley made a very enthusiastic speech about the meeting. She appeared very enthusiastic.

Cross-examination.

By Mr. Preston:

I was born in Russia. I haven't any business. I did not make a study of reading up on the war. I have some ideas on the subject of the war. I am under arrest now for tearing down recruiting posters before I ever saw Mr. O'Connell. Mr. O'Connell first saw me when I was in jail July 3rd. He came up there with my brother that day before the American Patriots was organized. I was then under arrest for tea*t*ing down army recruiting posters. I have two brothers and they both joined the Patriots. I was not connected with Mr. O'Connell's office I just came to see him there several times regarding my case. About a week after I had been arrested I did some errands around the office for Mr. O'Connell as a messenger boy for him and as a matter of courtesy to Mr. O'Connell who was handling my case. I did not sign the first minutes of the corporation. The first date my signature appears *in* July 19. My name is the first name signed to the minutes and I signed the minutes of the next meeting, and two after that. The minutes were orginally signed by Mrs. Malloy, then there was some confusion regarding the minutes and they were rewritten and when they were rewritten I signed them because Mrs. Malloy was not present. On account of my age I was not even eligible to membership I thought it would look better on my part to sign them as assistant secretary. I was drawing a salary of
$10 a week from the American Patriots and stopped about
178 August first. The American Patriots are not hiring my attorney. My brother hired him. I found the mailing list in the office. I do not know who brought it in. There were about 200 names on it. One was in Seattle, some others were outside of the city. They were not all German names. I don't know where the list is; I don't think it was there when I left the organization. I saw the list and asked Mrs. Malloy what was to be done with it and she told me that I was to use it as a mailing list. No one else gave me instruc-

tions to do so. The names were all foreign to me but they were not all foreign names. About 5% were foreign names. When Mr. O'Connell said that editors and Wall Street fellows and others who were talking about war should go first, he said that those who didn't want to go should not be made to go. It was not the object of the organization to gather together those who did not want to go, only those who had back bone to say they didn't want to go were welcome in the organization to test the law. Not to resist going to war but to test the law. We did the best we could to get funds to proceed with our work but there was not any occasion to test the law at that time. The funds were going out for hall hire and advertising but we had a reserve fund of from $50 to $75. About $300 or maybe $400 was collected while I was there. The majority of the members were of draft age. I don't know whether Henry Christman and Sam Lockemeyer were of draft age but I believe they were. Those who could not pay the full fees at once could pay a dollar down and pay the rest when they were able to for their initiation fees. I have no idea of the exact sum that came in. We did not collect it all at once. Of the list of 1250 you hand me three quarters would be of draft age, I believe. I have no idea what percentage of the persons whose addresses I sent literature to were of draft age. I simply saw the list in the office and Mrs. Malloy told me to send each one a circular. I sent only a circular. The minutes were rewritten after we opened the headquarters.

They were rewritten because some of the things weren't writ-
179 ten properly. That typewriting is pasted over the long hand writing because the original*ly* written by Mrs. Malloy and then typewritten minutes were pasted over them as we wanted them typewritten so they could be read easier. I wrote the minutes out in rough first and they were destroyed after I rewrote them. The first minutes Miss Malloy wrote them she had a sore arm and asked me to do it. Mr. O'Connell said a member who was drafted, after submitting to physical examination, and who wanted to test the law, there would be an effort made by the organization to get a writ of habeas corpus and get him out on bail, and that during that time while he was out on bail effort would be made to test the law in the courts. We were trying to get a test case. Those that could would be out on bail while one was having his case tested and those that could get a writ of habeas corpus would be free and the others would have to stay in jail. All the rest of the boys were to be either out on bail or in jail.

SAMUEL COHEN was duly sworn and testified as follows:

Direct examination.

By Mr. O'Connell:

I am the Samuel Cohen who was tried in this court before Judge Dooling and a jury for not registering. There were two cases tried the same day. Mr. Gabo's and mine. Mine was tried first and I was found guilty and sentenced to 30 days in the County Jail and I immediately commenced to serve my sentence. I claim that I was 33

years of age. I didn't appeal because my case was entirely different from the other cases. My case was not a matter of appeal because I had claimed the age of 33 and they claimed I was 29 and was not a question of contesting the case at all. I did not say anything to Mr. O'Connell but Mr. O'Connell said to me: "If you are 29 you had better register." I said, "I am 33 and I will not register." He said, "Alright, we will let the case go." I had 33c. and no more and could not pay the expense of appeal. That was all I had
180 before the case started and I had the same amount when I finished. I did not appeal the case because it was not a matter of appeal. I was not within the age. Therefore my appeal would not have any effect upon the case at all. The case that I was 33, I claimed 33 and it was for the government to disprove my statement. I never say any of the defendants in this case except Mr. O'Connell and never had a talk with any of them except Mr. O'Connell. Some of my friends hired Mr. O'Connell in my case, and not myself.

Cross-examination.

By Mr. Preston:

I am a Polish Jew, born in Russia. I did not want to test the case at all. I did not want to test the validity of the law. I did not want to have anybody using my name for that purpose. I think this was the first or second time I have been connected. I never pay attention to these cases as a rule. I knew Mr. O'Connell was making points but I didn't pay any attention to what points he made. I didn't care to have the case carried up. I was convicted and therefore I wanted to put in my time and didn't want to test the law. I was anxious to put in my time. I drove the wagon for the American Patriots advertising their mass meeting.

A. WIESTEFELD was duly sworn and testified as follows:

Direct examination.

By Mr. O'Connell:

When I went to Mr. O'Connell's office to file one of those, I asked for one of those exemption blanks, I was not going to take the examination, but I asked Mr. O'Connell about it and he said, "Yes, you take the examination, because it is legal;" so then I went down and took the examination; I think it was about three days after I joined. I asked him about certain papers to sign, and he said there is a little narrow paper that is all right to sign, if there are any others read them over carefully and if you don't want to sign them tell them you will bring them down to Mr. O'Connell, that you want to show them to him before you sign them. That is about all, I
181 think was said. Afterwards I was summoned by Mr. Preston to appear before him. Well, somebody came out to my home and told me to go along with him. They never had any papers. I

was summoned as a witness, I saw Mr. O'Connell. He said that I was summoned as a witness and that I should go. All I remember is, he just told me that as I was subpœnaed I should come down here. In the morning that I was subpœnaed I was here in the courtroom and at noon I went to Mr. Preston and showed him the card and told him I appeared as a witness and what would I do about it. He said, "Come right in my office and had a talk with him. He asked me a couple of questions. He asked me what good I thought I was going to get out of joining this organization. And I told him I joined it to have the constitutionality of the draft act tested in court. There was a couple of other questions he asked me and I told him I refused to tell him until I got on the stand. So then there was a secret service man in there and he said, "Mr. Preston, this man is a roughneck." I told him I was no roughneck. Then I don't know what other questions he did ask me. He asked me what I intended to do when I got my further notice to appear for military service and I told him I had not yet decided what I would do. Then Mr. Preston said something about filing a warrant for my arrest and I think I told him to go ahead. This was all while I was in his office. I didn't intend to take the physical examination. The secret service man said I said I didn't intend to go unless I was made to go. That is my state of mind now. I did not intend to take the physical examination but I went down to Mr. O'Connell's office and he told me to take the physical examination, that it was legal. He did not say if I was found unfit that would end it, nor did he say that if I was fit I could then take up these other questions. I did not ask him whether I should report or not or whether I should answer the call if notified. After I took the physical examination I went
182 back down to Mr. O'Connell's office to talk to him. I told him that they would not take my O'Connell exemption claim and he told me to go right back and hand it to them, which I did. Before I took the physical examination he told me that I should not sign any papers until I took them down to see him. I have not received notice to appear. After I was subpœnaed as a witness in this case I went to see Mr. O'Connell. I asked him if this was a subpœna as a witness, and he said yes, you are subpœnaed as a witness. I wanted to know whether I should obey that. I wanted to be sure about it. I wanted to take legal advice first. I came up here to the court in answer to the subpœna and then went in the United States Attorney's office and he asked me whether or not I intended to report for military duty and I declined to answer that several times. You treated me civilly in that connection. This secret service man accused me then and there of saying that I would not appear and there was a dispute between the secret service man and myself, and Mr. Preston the United States Attorney again asked me and Mr. Lane whether or not I was going to report and we both refused to say. The United States Attorney then said that he had a perfect right to question me in his office and I said I had a perfect right to refuse to answer. I don't remember whether the United States Attorney said whether it was his duty to hold me for the military authorities

if I signified my refusal, or a state of mind that would prevent me from answering the call.

Redirect examination:

Then I was arrested and I am out on $2,500 bail. I was arrested when I was subpœnaed as a witness for the governm nt in the court room and Mr. Lane also subpœnaed as a witness for the government was arrested at the same time in the court room. At this point the defendants offered in evidence the exhibit which had been marked by the government as Exhibit "A" for identification being
183 the speech of Daniel O'Connell delivered at Lodi, San Joaquin County, California, to which the government objected and the court admitted it in evidence and was marked defendant's Exhibit "A" and considered and deemed read original to be sent to the Supreme Court pursuant to stipulation.

CARL J. F. WACKER, one of the defendants was duly sworn and testified as follows:

Direct examination.

By Mr. O'Connell:

I live at 99 Bay View Street in the Bay View District, San Francisco, California, I first saw the defendant Daniel O'Connell August 6, 1917, in his office in the Pacific Building. I have known the defendants Herman B. Smith and David J. Smith for the past four years. I went to night school with them. The first time I saw the defendant Carey was at the preliminary hearing of this case before Commissioner Krull in this building, after August 6, 1917, and after we were all arrested. The first time I saw Dr. Hoffman was on August 6, 1917, prior to the time we were arrested. I saw Herman B. Smith and David J. Smith at a mass meeting in Dreamland Rink but I had not seen them for two years prior to that mass meeting and after they left night school. I left night school in the early part of 1916. After that I did not see them until the mass meeting at the Dreamland Rink. That mass meeting was on July 3rd when I saw both of the Smiths. On August 6th Mr. O'Connell sent me over to headquarters of the American Patriots where I saw Dr. Hoffman for the first time. Mr. O'Connell said the headquarters of the American Patriots were in the Mechanics Building and not in his office and that I should go over there if I wanted to become a member of the organization and I went over there and joined the organization. The first time I saw Rev. Mr. Megedoth was on August 13th in the assembly hall of the Pacific Building, and I never had any communication with him before that time. The first time I saw Louis Serbin was on August 6th in the reception room of Mr. O'Connell's office. The first meeting of the American Patriots I attended
184 was on August 13th. I never had anything to do with any of the defendants except as a member of the American Patriots. I never talked with any of them about the enlistment law or

enlistment in the United States Army at any time. The draft act I discussed with members of the American Patriots only in a general way. I never knew that Herman B. Smith or David Smith were at any time members of the American Patriots. I was secretary of the American Patriots and they were not members. I never heard Mr. O'Connell say at any of the meetings what the objects and purposes of the organization were. I signed one of the O'Connell exemption claims and presented it to the Board. After I became a member of the American Patriots I went down to Mr. O'Connell for advice in regard to the examination and signing of papers. I heard that a paper had to be signed containing an oath putting the person in the military service. I didn't intend to sign any paper binding me in any way and so I wanted to find out about it. I was told that it would be perfectly proper to sign the paper that they presented to me. Mr. O'Connell so told me and he also told me that it was perfectly proper to take the physical examination. This was on August 7th. That evening I presented the O'Connell exemption claim to the Board, and told the clerk that that was my exemption claim and that I would be down the next morning at the time stated in the notice to appear. The next morning at 9:00 o'clock I went down for the examination. While I was waiting for the examination the clerk of the Board came to me and asked me if my name was Wacker and I sais yes. He said you filed one of the O'Connell forms didn't you and I said yes. This was on August 8th. Then he wanted to know why I had filed it. I said "That is my exemption claim." He said, "I don't think that it is your exemption claim, haven't you any other?" I said, "I have a number of conscientious objections which the government does not recognize, this is
185 the only exemption form which I can present that covers my case. He said to me. "I think you have been misled, young man, and as far as I know you have always borne a good reputation in this district, and your father is employed by me, and I think it is best for you to withdraw this exemption claim." I said "No, I have a right to file an exemption claim, and that exemption form claim." He said, "Well you don't realize what you are doing." I says, "Yes I realize what I am doing. He says: "If you don't withdraw this form I will have to place you under arrest." I told him if that was the case he should go ahead and do it. I was turned over to the officer in charge of the station and told I was under arrest, and that he, the clerk of the board, would be responsible for my keeping. At that time I requested that I be permitted to take my physical examination, which was allowed; I was taken up stairs and examined, after the examination was over—I think it was the chairman of the board came over and asked me if I would withdraw it and I refused a second time. He said, "Well you didn't pass physically, and it would save a lot of trouble to withdraw it." I said, "I haven't got any guarantee whether I passed physical or not, I *must* have your word for it." I said, "Furthermore, I would not withdraw an exemption claim, I have a right to file an exemption claim. Then the clerk came over and they tried to talk me out of it but I would not do it. So they went downstairs and they tried to

get the officer to release me, thinking that I would withdraw the claim, the officer refused, and I was taken to the city prison and held without communication with anyone. The next day I was taken by the United States Marshal up before the Commissioner; the bonds were fixed that day; I was not able to get the bail, to get out and I had to stay over night in the county jail. That is all of it so far."

My folks obtained bail for me in the sum of $10,000. It was first
$1,000, and at present it is $10,000 and I have been out on bail
186 ever since. When I came to Mr. O'Connell I had made up my mind to test the law. I had made up my mind to that effect before I went to see Mr. O'Connell. I had been thinking of it ever since the registration law had gone into effect June 5, 1917. Anything that Mr. O'Connell or any of the other defendants said or did had nothing to do with my making up my mind. I made it up myself without regard to anybody else. I never had a conversation with anybody on the subject of obstructing the draft act. I never heard a conversation on that subject among the defendants or with anybody else. I never at any time requested any other person to refuse to register or refuse to be physically examined, or refuse to obey any other requirement of the Draft Act, or of the enlistment act. I haven't any idea of how many of the members of the American Patriots are under 32 years of age because I don't know them all, but of those I do know I think it is about 50%.

Cross-examination.

By Mr. Preston:

My father and mother are living. My father is employed by the clerk of the Board, Mr. Reddy. The advice to me by the members of the Board was in a friendly spirit but I did not know them. My father is employed by the corporation that Mr. Reddy represents. I knew who he was by sight but not to speak to him. After I was arrested and brought up before the Commissioner Mrs. Adams, Asst. United States Attorney asked me where I had obtained the O'Connell exemption claim and I refused to answer that question. She asked me if I did it of my own volition and I said yes. Mr. O'Connell did not interrupt the conversation. He came in before the questions were asked and those were all the questions asked of me. I saw in the last clause of the exemption claim where it says that notwithstanding all the humbugs and lies the country is in no danger,
and that John Bull and England is over here influencing and
187 directing our American affairs and so on and so forth. I knew what it meant and believed it to be true and I did not intend to withdraw any part of it and refused to withdraw the whole of it. I was counseled a number of times and asked in a friendly spirit if I would withdraw that kind of a claim and I refused to do it because that was my exemption claim. I knew what was in the O'Connell Exemption claim when I signed it, but I didn't pay any attention to any particular language. It was not for me to decide what benefit the filing of the claim for exemption or what good its language would do. I did not ask any advice on the point. I filed

it of my own accord and no one told me to file it. I did not consider that it would do me any good or would do me any harm. I didn't see anything wrong in any statement in the exemption claim. I saw the notice of the meeting of July 3rd which is contained in United States Exhibit No. 3. I had attended other meetings of that kind prior to that but I did not keep track of them. That was the first meeting that I went to where the draft act was discussed. I had never heard Mr. O'Connell or Mr. Miss or Rev. Whitaker or John D. Works speak before that time. I had never been to any of Mrs. Skeffington's meetings. July 3rd Herman B. Smith made several short speeches and I don't remember what he said. He said something about money being collected to help the boys who wanted to test the constitutionality of the law. He said substantially what was testified to by the stenographer as a witness in this case. I didn't form any opinion about what he said. My sentiments are not the same as I do not agree to everything that everybody else says. I did not form any opinion about it. My idea was that there was some sort of movement to repeal the law, that is the way it sounded to me; they always take up a collection at the meetings and I thought it was proper. I didn't know what they were going to do with the money. I had not made up my mind on that night of July 3rd to refuse to go
188 to war or to do anything. But I had made up my mind what I was going to do before I went to Mr. O'Connell's office on August 6th. I had decided to test the constitutionality of the law before I went to Mr. O'Connell's office but I cannot tell how long before that I had made up my mind. I had intended to see some attorney. I had no idea of being called to report for military service when I went to see Mr. O'Connell. How could I make up my mind to answer the call to service when I had not received any call? My present view on the question is that I want to test the constitutionality of it. I have been physically examined twice. The last time I passed as fit. I have been notified to appear for military service. I have not made up my mind what to do. I am supposed to report tomorrow at 1:30. I cannot tell what I am going to do tomorrow. I might have an idea in my mind now and might change my mind. Well, if I intend to test the constitutionality of it I will have to refuse to answer the call. No lawyer told me that. That is just my own idea. If I answer the call I will be under military service. It would depend upon the circumstance whether I would go if I were advised that I could test the law after I went as well as before, or as well as by refusing to go. According to the way I understand the law now it is that if a person answers the call they are subject to the military law; if they don't they are subject to the civil law. I found that out myself. How could a man be under civil law when he is in the hands of the military authorities? I formed that opinion myself, that if I don't go I will be under the civil law, and not the military. I don't see how I could be within the jurisdiction of the military arm. I never signed any oath. I didn't sign any oath or do anything that put me in the military service. If it is compulsory service then it is force; then they put me in the army by force. I was born here. I claim to be a loyal to the country in which

189 I am living. I am 23 years old and my business is that of a clerk. None in particular. I was in the mercantiie agency business. I am out of employment now. I don't see how I will have to resist somewhere before I can test the law. No one has advised me as to that. I circulated some of this literature. I have been and am secretary receiving no pay. I have not been there all day at the headquarters. I saw one legal opinion, just glanced at it, and had not seen it before I had filed my exemption claim. I had to join the American Patriots before I received any legal advice from Mr. O'Connell. He gave me no advice until after I had joined; then I went back to his office and talked to him. I have not seen any mailing list since I have been secretary. The names and addresses to which I mailed literature I received from Louis Serbin. I don't know where they are. I have been secretary since August 13th and have seen no lists since then and don't know where any list is. I produced here all the records and correspondence that I had of the corporation. It was before I became secretary that I saw a list of names and addresses. The membership list is our mailing list now. The other list I returned to Louis Serbin who was acting as assistant secretary. I didn't succeed him, I succeeded Mr. Krause. Up to August 13th when I had spare time I helped Louis Serbin. After I became secretary Louis took his orders from Dr. Hoffman and myself. I am just keeping the minute book. I know the purposes of the corporation. One of the purposes is raising funds to test the constitutionality of the law. I don't know anything about Henry Christma, Adam Mettler, San Lockemeyer or the other Mettlers. They are now members of the corporation. I don't know what the corporation is going to do for them. I don't know what the corporation will do for me, in my hour that is just now drawing on me. I don't know of any fund voted to defend me in my refusal to answer the call to the service. I
190 don't know how much is in the treasury at the present time. I didn't engage Daniel O'Connell. I am expecting the corporation's attorney to take my case to the Supreme Court of the United States. I do not know about Wuestfeld and the others who are in the same frame of mind that I am in. I don't know anything about whether there is to be one or more test cases. I don't know what is to become of them so far as the corporation's interests in them is concerned. I don't know what Daniel O'Connell is going to do. I have not heard any discussion as to what those who have contributed their money to this corporation propose to do. I have not inquired either. The money collected has been paid out for these expenses in advertising and sending out applications for membership, and things of that kind. I think that is up to the legal adviser of the corporation what protection or what this club is going to do for me if I finally make up my mind when the hour of my response to the Government's call comes, that I am not going to obey it; Mr. O'Connell is the legal adviser of the corporation; he is the attorney for the American Patriots, I am a member. If to-morrow I make up my mind to refuse to report, what protection I am going to have through this corporation or association, I suppose the association will take up the matter with Mr. O'Connell, I suppose the Association will do the same

with every member who refuses. If we had 5,000 members of draft age and they were all summoned to answer the call to service as I have been notified to do. I don't know whether there will be one or five thousand cases. I do not know whether the corporation's attorney would have to handle these cases. I am not a lawyer. I have not said anything about obstructing the operation of the draft act. I don't know that it would be an obstruction if everybody thought as I did. The defendants Smith are not members because their names do not appear on the books. Their names appear as incorporators. I have never seen their resignations that was long before my
191 time. As far as I know there is nothing in the record showing that the Smiths had resigned. Their names do not appear on the membership list. I do not think I could give a complete list of the present directors. There are nine directors.

Redirect examination.

By Mr. O'Connell:

I don't know by whom the meeting of July 3rd was conducted. I do not think David Smith took my part in the July 5th meeting; I saw him in the lobby and just said good evening to him. I didn't discuss any question with him. This prosecution has prevented a number of people from joining the American Patriots. They were afraid they would lose their jobs. They had jobs with private concerns. Several had requested not to be summoned here as witnesses as they were afraid they would lose their jobs.

Direct examination.

By Mr. O'Connell:

RUSSELL L. DUNN was duly sworn and testified as follows:

I know the defendant, Daniel O'Connell, for about eight years. I first met the defendant Carey in Mr. O'Connell's office the latter part of July. I met the defendant Wacker. I met the defendant Smith brothers once in Mr. O'Connell's office after this prosecution was commenced. After Mr. O'Connell was arrested. I was present in Mr. O'Connell's office several times during conversations between him and persons who came to consult him about the draft act. I heard what was said. Late in July Mr. Carey and Dr. Hoffman and a number of others were present, and someone said he had refused to take the physical examination and Mr. O'Connell said to him, "Take the physical examination. Do not refuse to take the physical examination." And some other one asked Mr. O'Connell "Shall I sign the paper they present?" Mr. O'Connell answered. "Sign all papers except the oath." "What you want to do is to preserve your legal rights, you don't lose your legal rights until you become enlisted by signing the military oath." The door between the two rooms of the office was open and some were in the private
192 office and some were in the main office. Several questions of the same nature were asked Mr. O'Connell and his answer in

every instance was to obey the law and do not resist. I do not recall hearing any of the other defendants say anything at the time except to ask questions. They said nothing to anybody except to Mr. O'Connell. Mr. O'Connell discussed the draft act with me in the early part of June, and in the course of our conversation Mr. O'Connell asked me what I thought of the constitutionality of the draft act of May 18, 1917. I said to him that I had read over carefully and closely the debate from day to day in the Senate when the bill was under discussion and that a number of objections appeared in the debate made by senators, and after giving my opinion as to the constitutionality of the draft act I asked Mr. O'Connell why he made the inquiry. He said "I have been asked to take a case up to the Supreme Court to test the constitutionality and I have been thinking of it. If I do take that case, I should like you to help me prepare the brief." There were other conversations on the same subject afterwards. Late in June, something recalling this matter, I asked Mr. O'Connell if anything had been done in relation to that proposed case and he said no, that it required a large amount of money, and that the parties were trying to find a way to raise it and that Mr. O'Connell did not know whether they would succeed in raising the money; that Mr. O'Connell himself could not undertake to pay the expenses of such an action. Subsequent to the latter part of July, near the first part of August, and about the day of the first physical examination, I was in Mr. O'Connell's office frequently, and he called my attention to the statements in the debate appearing in the Congressional Record daily for many months past and at this time I called his attention to the debate in which Senators Borah, Hardwick and Reed participated. He told me to mark that and hand it to him later which I did. I had a conversation with Mr. O'Connell afterwards when he filed a petition for a writ of
193 habeas corpus for one of the young men.

Exception No. 9.

At this point the following questions were asked, answers given statements made by the court and rulings made and exceptions taken as follows:

Mr. Preston: Was that before or after his arrest?
A. After his arrest.

Mr. Preston: I object to it on the ground that it is a selfserving declaration.

Mr. O'Connell: They have been offering evidence here to show my state of mind, even saying that I was pro-German and anti this and pro that; they even wanted to introduce the "Independent" of two years ago to show my state of mind now.

The Court: That was all prior to this charge; anything done after the charge is not admissible. It might be admissible against you, but it would not be admissible for you in the way of selfserving statements.

Mr. O'Connell: I don't want any self-serving statements; I want to know what I did at that time. They brought out from the defendant Wacker yesterday what his opinion is today and yesterday.

The Court: But he is a defendant.

Mr. O'Connell: And so is O'Connell.

Mr. Preston: But O'Connell is not on the stand.

The Court: We are speaking now about the limitation of evidence.

Mr. O'Connell: If they can bring out what Wacker said yesterday, or what the others said yesterday, about their opinions as expressed it seems to me that we are entitled to the same thing.

The Court: You say this occurred subsequently to the arrest?

A. Yes sir.

A. Statements made by Mr. O'Connell after his arrest?

A. After his arrest, but on the same subject.

194 The Court: The objection is sustained.

Mr. O'Connell: We save an exception.

To which ruling and exclusion of evidence the defendants then and there objected and excepted and now designate it as Exception No. —.

Thereafter the witness resumed his testimony as follows: I remember the time when the O'Connell claim of exemption was prepared and when I first saw it. I saw the prosecution's exhibit No. 19 and 10 before the blanks were filled in, and before it was finally prepared. I contributed to its final preparation after I saw it. I added something to it. Mr. O'Connell in preparation of those documents which are the Carey and Murphy claims of exemption as filed by them, showed them to me late in July and asked me what I thought of them. I asked him "What is the purpose of it?" He answered, "It is a claim of exemption." I told him it needed revision. I suggested corrections here and there. Mr. Carey was present when it was handed to me or immediately before. Mr. O'Connell said that the last paragraph in that claim of exemption has to be there in order to state the cause of the applicant filing the claim. He said that he would make the amendments which I suggested. There was quite a conversation between us over the last paragraph. He said it had to be there to give the reason or show the occasion of making the claim of exemption. We discussed the constitutionality of the law at that time in connection with the suggestion which I made as to certain amendments which he accepted. Mr. O'Connell said he thought the draft act was unconstitutional on the grounds stated in these documents. I had frequent conversations with him over these questions of draft. Mr. O'Connell declared frequently to me that his sole object was to test the constitutionality of this act on behalf of his clients; that he did not believe that act to be constitutional; and from time to time stated the grounds and discussed them with me. He stated who his clients were. Some
195 of them were the defendants in this action. Others as members of the American Patriots were his clients. He also said

the American Patriots organization had been made to raise money for the common defense. That the matter had taken shape in that organization which had been discussed by us at the previous meeting in June. All conversations were substantially on the same grounds. Mr. O'Connell said it would cost at least $2,500 to test the constitutionality of the act; that there would be the expense of preparing the record and going to Washington to argue it before the Supreme Court, and that the fees and charges were very heavy in cases in the United States Court; and he estimated it would cost at least $2,500. The items were not discussed but it was stated that there must be some common action by some organization as only one case would have to be tried and no one person could pay for all. I do not recall any conversations that were different from the conversation I have already recited; they were all on the same general tenor. I am now a member of the American Patriots.

Cross-examination.

By Mr. Preston:

I had absolutely no personal interest in this matter. I was making social visits on Mr. O'Connell who is my friend. He stated that he thought his stenographers were spies, and asked if my engagements permitted, to come into his office and do my writing on my reports and papers there and answer his phone call, and in that way my presence in his office was sometimes two or three hours a day, and sometimes half or threequarters of the day. I am not a member of the bar. I have no law license to practice law. My business is advising engineers, business men and lawyers. (At the request of the United States Attorney the witness delivered to the United States Attorney the card of the witness.) My business is advising corporations, attorneys, lawyers, engineers and others on the subjects of which I assume to be conversant. I know that lawyers for the last 35 years have submitted their knotty law points to
196 me, particularly on constitutional questions recently. I have studied law. I was admitted in the District Court in Placer in my 31st year on the motion of Judge Hale, but I am a civil mining engineer and have progressed so much as to become a consulting engineer and such it is necessary for me to know a great deal of law. They call me judge when I go before the committees in Washington. I was invited by Governor Harmon to address the bar association of Ohio and consulted by Sherman B. Brown and advised him on legislation before Congress, and I have written frequently articles for law magazines, one of them has been commented upon by every law magazine in the United States. I have been paid by clients very heavy fees. Sometimes attorneys asked me to draw papers and frequently draw underwriting contracts for large business undertakings. There was this engagement between Mr. O'Connell and myself, that if I was paid for work on the draft law he would pay me; if he didn't get any fee for it he would ask me to help him as a friend. I never heard about any New York lawyer. I didn't understand Mr. O'Connell was going to divvy with me, and

I never said so. He was going to pay me a small sum for my time. I was not interested in the progress of the campaign to raise money to test the constitutionality of the draft act. I took no interest in the phase of the matter. I had plenty to do besides that. As a consulting engineer I simply write papers and it would be just as easy to write them in one place as in another. I did not go to Mr. O'Connell's office to keep the stenographer from spying on him. Mr. O'Connell said there was nothing done in his office to spy about. I was not employed to keep spies off. I didn't even examine behind the pictures of Washington Jefferson, Marshall, Calhoun or the others on the wall of his office to look *to* a dictaphone. I was perfectly willing that a dictaphone could be there and take down
everything that he said or what I said. I would not be
197 pleased if the dictaphone was there to preserve the record of my voice. The corporation was organized without my knowledge. One way of raising money is no different from another so long as it is a legal way. I did not know that the wagon with the John Bull sign on it was going through the streets until after it was stopped. I didn't approve of it. I never knew of the slides in the moving picture theatres. There were two offices. I was not in the office of the American Patriots. Mr. O'Connell's statements on law were made in answer to questions. I did not hear him make statements in precisely the form set forth in the legal opinion. I do not recall that he said anything to the young men as to what they should do while testing the case. I talked to the young men in Mr. O'Connell's presence and told them to do everything the law requires except signing the oath. If they offer to force them to sign the oath sign it, and to do everything the officers told them; because all that is necessary in a matter of this kind is to save the legal rights, and that is what I told the boys. "You are acting merely to save your legal rights. You are not obstructing." Mr. O'Connell told them to do the things they were asked to do. There were several in the room at the time that I told them to do everything the law required. Mr. O'Connell had stated everything up to the last point as to what they should do when it came to a question of signing the oath; it was clear what he said that I added my words, "Don't obstruct or refuse to do anything." Mr. O'Connell had advised them not to take any oath and then I told them to take the oath and do anything that the law required but to say that they did it under duress. Mr. O'Connell said nothing. That was all that *said* said on the subject and the young men left. In my presence Mr. O'Connell instructed them not to obstruct or be obstructor. That is what Mr. O'Connell said to them. He told them to go be-
fore the officers and take the physical examination when they
198 were called, and to take and sign the paper which the physicians handed them, to sign. And to appear and make their protests as provided by the law at every step. He told them to notify him, if they were notified to appear for service. He told them to refuse to sign the oath and make them take them by force. He told them to sign the oath but to do it under protest. Mr. O'Connell by his silence and manner approved what I said. He

told them not to voluntarily take the oath. That is all that he said to them. I do not recall anyone asking him the question "Shall we go or shall we not go?" He said his policy was going to be to have one of them refuse to go and then bring a habeas corpus proceeding and test it clear through to the Supreme Court. I understood the others were to take similar action. He never said anything about remaining out on bail or that they were to be in jail. When I said the others were to take a similar course, I was using Mr. O'Connell's language. He did not know which man would take action. He was giving the same instructions to all of them without knowing which one would come first. The object was to get one; he did not know which one would be called first therefore he had to give them the same advice. It was not discussed as to whether they would all be called the same day. I know that the object of these boys in joining the American Patriots was to keep from being forced into the war, I told them that was so. When ever Mr. O'Connell asks me a question of law I tell him. I never advised the American Patriots as to anything. I have no case in charge. Mr. O'Connell has not requested me to handle the case of anyone. He told me that Donlan had refused to report for service. Some were told to do certain things and had refused.

DANIEL YOST was duly sworn and testified as follows:

Direct examination.

By Mr. O'Connell:

I am an attorney at law practicing in San Francisco, admitted in 1896 in Massachusetts. My offices are in the Pacific Building, next to Mr. O'Connell's. I remember during the last week in May or the first week of June people going to the office to consult about the draft act. There were two young men from Oakland, one said he was a socialist and the other said he had religious objection to going to war. They were within the age and wanted to know what they could do about it. Mr. O'Connell told them to register. They said they did not even want to register; they said they were afraid they would lose their rights. Mr. O'Connell said "You register." Mr. O'Connell said that registering was merely taking a census and then after that you submit to the physical examination. Then the next move was on the part of the Government. Afterwards and before I changed, there was another young man named Lustley, or something like that, and Mr. O'Connell told him the same thing. The first man asked Mr. O'Connell if he didn't have remedies in the courts of California. Mr. O'Connell said no, that this was a National question under the national laws. He said his attorney had applied to the Supreme Court of California for a writ of prohibition and had failed. Mr. O'Connell replied that that was not the proper proceeding to take, and that everything must be done legally, and they must register, submit to the physical examination, and the next move was on the part of the Government, and if they were arrested their remedy was to

199

sue out a writ of habeas corpus. This statement was made between the enactment of the conscription law and before June 5th. There were several other incidents. Mrs. Krause and Mrs. Manley came in to see me and introduced themselves. They said they had attended the meeting at Dreamland Rink. Mrs. Krause said she had two sons or two nephews; that she was very much exercised; and had not been able to sleep nights and Mrs. Manley was also interested. This was all said to Mr. O'Connell. I took them in Mr. O'Connell's office, after a preliminary talk with them. Mrs. Krause said, "Well, what can be done?" Then Mr. O'Con-
200 nell spoke about the necessity of funds to take the case to the United States Supreme Court as the constitutionality of the act would probably be sustained by the lower court. He quoted one of the judges in the lower court stating that he did not want to take the responsibility of declaring a law of Congress unconstitu-ional just at this time. Mr. O'Connell said it would mean possibly $1500 or more to print the record; also mean going to Washington and possibly having Eastern counsel associated, and that he had in mind the organization of a corporation to test the validity of the act. As a result of that conversation they came in the next day or so and Mr. O'Connell went ahead with the incorporation. Mr. O'Connell and myself discussed the constitutionality of the draft act on many occasions.

Exception No. 10.

At this point the following questions were asked and answers and ruling made and exceptions taken:

Q. Will you tell the jury what Mr. O'Connell said about it?

The Court: To this witness?

Mr. O'Connell: To this witness.

Mr. Preston: Objected to on the ground it is self-serving declaration; on the further ground it is immaterial.

The Court: I think Mr. O'Connell, while I am disposed to permit you to have recited the advice and the talk you had with those who were interested that this would not be admissible.

Mr. O'Connell: I want to show the state of mind of Mr. O'Connell, they put in that Socialistic speech here, your Honor.

The Court: But this is not competent for that purpose.

Mr. O'Connell: What Mr. O'Connell said?

The Court: To his legal brother here, no.

Mr. O'Connell: On the subject of the constitutionality of the act?

The Court: The objection is sustained.

Mr. O'Connell: We save an exception.

201 To which ruling and exclusion of evidence the defendants then and there excepted and now designate as Exception 10. Thereafter the witness resumed his testimony as follows:

I had a conversation with Mr. O'Connell upon the best method of testing the draft act and the opinion Mr. O'Connell gave was that

men who were drafted would be arrested and that then the method would be to sue out a writ of habeas corpus. It was a lawyer's talk furnishing authorities, etc. I know that Mr. O'Connell had a collection of authorities on his desk that he was studying and had been studying on the constitutionality of this draft law. Night and day he was examining into it and making it a special study so much so that the few cases we had together, not being partners, that all the work devolved upon me. I attended the preliminary meetings of the American Patriots in the Assembly Hall of the Pacific Building. Mrs. Manley, Mrs. Krause, Herman B. Smith, Mr. O'Connell and from thirty to forty other people, I should say not more than forty were there. There were old and young men and women. Mr. O'Connell said something on the subject of organization for the purpose of testing this draft act as the purpose of the meeting. Mr. O'Connell was in the chair and spoke about the legislation which had been enacted by Congress and the study he had given to this legislation; quoted from Daniel Webster on the draft law also the Attorney General Wickersham, and Harris M. Taylor's message to Congress which was laid on the desks of all the congressmen on the subject of the constitutionality of the draft act, and had an array of legal documents and opinions, and stated that according to the constitutional lawyers of the past and present that the militia could not be sent out of the country. The state militia could only be used to put down insurrection, repel invasion and to compel obedience to the laws of the country; he read from the constitution and also a telegram from Judge Landis and Attorney General Wickersham
202 and Wickersham's reply also Wickersham's opinion while attorney General of the United States to the secretary of war. He went into quite a legal exposition of the entire matter. He said that anyone had the right to test the validity of the law in the absence of an opportunity to repeal the law. He also went into the politics of it; that later on undoubtedly the present congress would be swept out of office; and he mentioned the initiative, the referendum and the recall being in the California constitution and he said that he was in favor of amending the National constitution and including those of the *National* Constitution, and thereafter there would be no way except on a referendum to the people, and that the idea was to form a California Corporation. This was at the preliminary meeting. There are other things which I cannot remember. He also went into the cost and said it might be from $2,500 to $5,000. And that he could not pay it and that no one man should be called upon to pay the expense. It was agreed to form a corporation for the purposes mentioned and there was a committee appointed to prepare articles of incorporation for the next day. Mrs. Manley and Mrs. Krause and the rest of them were to report at my office the next morning. I did not prepare the articles of incorporation. Mr. O'Connell was out at court and the signers came into my office he having left the papers with me as was frequently done when either of us went out. He showed me where to — the people sign. Just as they were signing he came in and all went in his office, to have the papers signed. I attended one meeting of the

American Patriots after the incorporation but none after that. I don't remember whether the defendant Carey was present or not but Herman B. and David J. Smith, Dr. Hoffman, and Mr. and Mrs. O'Connell, and a great many other people outside the defendants, about 40 in all were present. I remember them going up and signing the roll that night. There was a by-law passed fixing
203 what would constitute membership and quite a discussion as to what the initiation fee should be, and whether there should be an initiation fee or monthly dues. I left before the meeting was over. I know that 25¢ a month was one feature of it. By initiation I mean an entrance fee. I think it was fixed at $1 and at 25¢ a month. Most of those present came forward and signed the roll and paid their fees that night and after that there was an election of officers. Many times Mr. O'Connell and myself were in accord on one feature of the unconstitutionality of this act, but there was one other one that I was in doubt about and I am in doubt about now, and we would talk these things over. I would chide him about giving so much of his time to matters of a public nature but he has been doing that all his life. I was not in sympathy with Mr. O'Connell wasting his time on these matters.

Cross-examination.

By Mr. Preston:

I have known Mr. O'Connell for 21 years. I have resided in California since March of this year. I came from Nevada and set up a law office here in March and shared a reception room with Mr. O'Connell. We had two cases together; one in the lower court and one in this court. He was the counsel and I assisted him. They were the Cohen and Gambo cases. Mr. O'Connell was counsel for a couple of days in the Von Goltzheim case, and I have been the counsel for Mr. and Mrs. Leonhauser. We were not together as counsel for those cases. Mr. O'Connell has never been counsel for Mr. and Mrs. Leonhauser. About August 4th I ceased to use Mr. O'Connell's reception room. There was a disagreement between us as to the time he was giving to the matter of the American Patriots, so I hired another reception room. In a conversation with the United States Attorney one day I think I used the work "crack-brain," in speaking about the American Patriots' movement. I did not mean to say crack-brain about Mr. O'Connell. On the
204 night of July 4th I read the Declaration of Independence and then spoke about it in the Dreamland Rink. I have the speech in my pocket. I advised everybody to obey the law. I never saw the legal opinion presented here. Miss Barclay is entirely in error when she says she typed that document at my request. I took the articles of incorporation of the American Patriots down to Miss Barclay and told her "Mr. O'Connell wishes you to type this." I took the original down. Mr. O'Connell wanted a couple or more copies made. Daniel O'Connell I think showed *him* a pamphlet which Hannis Taylor left on the desk of the Congressmen, and the Taylor document also included the Wickersham opinion. We went

back to the power of Congress to declare war, general war or limited war. We went into the question very thoroughly. This law has not been adjudicated. The opinions are all to the effect that a country can draft its able-bodied citizens, it can justly exact that service from all, but there is a grave doubt about sending militia out of the country, that is what I found. I have *no* opinion that this law is unconstitutional and I have the United States Supreme Court for my authority. Mr. O'Connell advanced the proposition to sue out a writ of habeas corpus and until that one case was determined the remainder would be entitled to bail. Mr. O'Connell in these meetings said, "We have no objection to anyone enlisting, if you want to go and fight, go. I have no objection to anyone enlisting." If you don't want to go we are ready to advise you. He told them that they would probably be arrested at which time they could sue out writs of habeas corpus. He advised them to refuse to take the oath, and then sue out a writ of habeas corpus. When they refused to take the oath then they would be arrested and they would be entitled to their civil rights, whereas he said, if you went into the army you lose your civil right. He did not discuss with me that he expected — hundred or more members of draft age to join the
205 corporation. He never had any conversation or talk as to how much membership among the draft men was expected. Our talk about the act was before the *information* of the corporation. I was not interested in the American Patriots. I attended meetings but never enrolled. I was interested in seeing a test case because I had been written from New York that Hannis Taylor *was* bring a test case in New York. I hear that Mr. Taylor had been retained. I heard there were half a dozen cases, including the Ohio Socialist case and the New York Socialist case going up to the Supreme Court on the same points. I said I was willing to make a test case but I didn't care for a collective proposition on it. That is the word I used. As a lawyer I was willing to test the case. I understood that every man arrested for failure to report for service that this corporation through Daniel O'Connell, its attorney, would have to take care of his case. There would be just as many cases as there would be members who refused to go into the service, and I remember telling Mr. O'Connell that he would have to bail these people out. When I urged this objection to him he insisted upon his right to proceed. I told him by organizing this corporation and getting a lot of these young fellows to come in here he was going to be under obligation to try and stand by them. I didn't see how he was going to do it and objected to it. He stated, "When I am right and I know I am right, nobody can advise me." He said, "I am absolutely right in this matter." He didn't say how he was going to fulfill the obligation that the corporation held out to these members or how he was going to keep them out of the army while the act was being tested, other than that he decided to adopt the writ of habeas corpus. Mr. O'Connell was the legal adviser for this whole proposition. I stood ready at any time to make a test case. That is where we split.

There may have been something said by Mr. O'Connell that

206 the men were to take the physical examination because by that means they might get out without any proceedings; that sounded familiar there was something said about that. He argued his way and I argued mine. Mr. O'Connell told them to refuse to take the oath and then they would not lose their civil rights. The point was that each and every member of the American Patriots corporation was to be protected and kept out of war, it was to protect its members if they were drafted, in the legal way of getting out a writ of habeas corpus. Mr. O'Connell said, "If anybody wants to enlist voluntarily, go ahead." I understood Mr. O'Connell to say that by taking the physical examination they might do away with the necessity of further effort if pronounced unfit, and if pronounced fit then the question of habeas corpus could be considered thereafter. He told them to refuse to sign any papers the effect of which would be to put them in military service and to then sue out a writ. I never heard of the O'Connell form of exemption until I saw it in the newspapers a long time afterwards. I did not help draw it or see it before it was used by any of the young men. Mr. O'Connell and myself read the Espionage Act together. I don't remember whether I told Mr. O'Connell that if the law was pronounced valid, that he would be guilty of obstructing the law and get himself into trouble by this collective process. I did see a copy of the O'Connell exemption claim on the afternoon before its publication. I think I did advise Mr. O'Connell that if the law was pronounced valid that it would be an obstruction or an evasion of aiding and abetting in its evasion, if the law was pronounced constitutional by the Supreme Court, if he carried out the method outlined by him It may have been that that was the reason that I wanted a test case instead of a million or one hundred cases.

207 Noon Recess

Recalled for redirect examination after noon recess.

I did not advise Mr. O'Connell that his conduct would constitute a violation of the Espionage Act. I discussed that feature of it after he was arrested and said that that would probably be the government's contention. I did not at any time prior to his arrest discuss that subject with him in that way. The discussion I referred to was after his arrest when we were discussing what theory the prosecution would present, and I said that probably would be the government's contention. When I referred to John-Bull-Martyr- that was after Mr. O'Connell's arrest. I was assisting Mr. O'Connell in the Gambo case. We did not appeal because Gambo said he would serve his hour and register. He was sentenced to an hour in the custody of the marshal and the marshal took him up to register. He was in the regular army but he was out on bail. He came to our office. At a meeting subsequent to the July 4th meeting at Dreamland Rink, as chairman I expressed the opinion that the draft act was unconstitutional. I know nothing about these eastern cases on appeal except what I read in the news-

papers. I don't know whether there was any such case or not or how far they have gone.

Recross-examination:

After concluding my testimony this morning I saw Mr. O'Connell in his office. His wife was crying. I don't remember that he told me that I ruined his case. Mr. O'Connell told me that I was in error as to that conversation with him. He said, "When I used that language to you when I was talking about the government's contention." I understood this morning that the inquiries made by the United States Attorney were addressed to the proposition of why I quit this movement to which I answered I was not interested in the movement. I was not interested in the matter. I was willing to take a test case in a proper way, but I was not interested in the American
208 Patriots. I split with him because there was a difference of opinion between Mr. O'Connell and myself about the entire matter and I was working 12 or 15 hours a day and this matter was coming up all the time and I had not time for it. I did not advise Mr. O'Connell. I was willing to make one test case and I think as a lawyer I had a right to test any law and bring an action. The difference between Mr. O'Connell and myself that made me withdraw was that this matter was occupying the entire time of Mr. O'Connell. After the preliminary meeting they actually took in $16. I could not see how they could test the law upon any such receipts as that and I had no*t* further desire to pursue the matter. They talked of sending out circulars. I think Mr. O'Connell said he was going to have the wagon going up and down the street advertising the American Patriots. I made that speech on the 4th of July in which I advised people to remain within the law and obey the law. One of the subsequent speakers—and that is what I repeated to you when I used the word "Crackbrained," said I — rather go to jail in America than to hell in Europe." They were to have an office over in another building and I was afraid that something might be done there that Mr. O'Connell would not approve of. I could not pursue the matter any further. I knew that Mr. O'Connell was anxious to have everything done legally. The proposition was that each man that was arrested should sue out a writ of habeas corpus and then that one man should test the law and the others remain out on bail until it was tested. The purpose of the corporation was on behalf of the members to test the validity of the draft act. I recognized the purposes of the corporation held out to these young men that they were inviting to enlist in its ranks was to protect them from going if they didn't want to go. It did not occur to me that getting a large number of young men into the corporation upon the representation that they could be kept out of the service and then undertake to
209 make a test case of one would result in obstruction. It might prevent a number of young men from serving while waiting until this matter was determined but it all depends upon its constitutionality. That is the way we discussed it. It is for the law to say whether they will wait or not. The sole purpose of the organization

was to test the validity of the draft act in the way I have stated. There was no idea of obstructing any law. It was simply to test its validity and constitutionality, as Mr. O'Connell said to them "If you — to enlist, enlist. We don't wish to prevent anybody." It was not that the methods the- were pursuing were not in accordance with the law that caused me to drop it. There were other matters that came up and I did think that somebody would do something that Mr. O'Connell would not approve of. I didn't know what plans he had further than those he announced. I preferred to go on and practice law. I saw nothing whatever unusual in the methods pursued by Mr. O'Connell in this matter. There was nobody called to the service up to the time I left. I took entire charge of the Leonhauser and the Von Goltzheim cases, and took all my time. There were others who came in to test the constitutionality of the law outside the American Patriots and all those that came in and consulted about it declared they were determined to test the law before they ever saw Mr. O'Connell or myself, and that they were not going to war, that it was unconstitutional. Women came in crying and said they didn't want their sons to fight for England and such things as that, I remember the corporation that was organized here in San Francisco to test the legality of the Spring Valley Rates and also for sewer assessments.

MICHAEL GUINEY was duly sworn and testified as follows:

Direct examination.

By Mr. O'Connell:

I produce here my receipt for membership in the Amer-
210 ican Patriots as requested which receipt I received the day I joined. I had nothing to do with the American Patriots before that. It was the first day I ever saw Mr. O'Connell and I never spoke to him before that, although I had seen him before that time. The receipt is dated August 13th, 1917, for $5 entrance fee and was read in evidence and marked "Defendant's Exhibit B." I never saw Mr. O'Connell or any of the other defendants at any of the meetings of the Constitutionalists.

ERNEST R. HOFFMAN was duly sworn and testified as follows:

Direct examination.

By Mr. O'Connell:

I am a regular physician and surgeon duly licensed to practice in the State of California. I was born in California and have resided in San Francisco most of my life. On June 5, 1917, I was a member of the District Board of San Mateo under the draft act of May 18, 1917, and registered a great many people. The first time I saw any of the defendants was on July 21, 1917, when I saw Mr. O'Connell at a meeting of the American Patriots in the Assembly Hall in the second — of the Pacific Building. I never had any communication

with him in any way prior to that except that during the day of July 21, 1917, I called him on the telephone and asked him when there would be a meeting of the American Patriots and he told me that night at eight o'clock and I went down to the meeting. Somebody asked for a statement of the purposes of the corporation and Mr. O'Connell made the statement. He said substantially what is — the circular letter which I saw on the morning of July 21st and which is the prosecution's Exhibit No. 11. The picture heading was not on it at that time. I saw none of the other defendants that night. I never saw Herman B. Smith until some time after I had become a member of the American Patriots. I think it was just before Mr. O'Connell was arrested. It was after we opened headquarters
211 in the Mechanics Building. I saw David J. Smith a few days before I saw Herman. I saw the defendant Carey early in August. I cannot remember the date. My first recollection of seeing Mr. Wacker is after he had been arrested. I cannot tell when or with whom of the defendants I had a conversation on the subject of enlistment in the service. I have had so many conversations regarding the enlistment that it is hard to segregate any particular conversation on that subject. I had a conversation on the subject of the draft act. I have handed out quite a number of circulars to various people such as Exhibit 11. I handed one to everybody who came into the headquarters inquiring about the organization. I handed them a circular, told them to read it, that that explained the purposes of the organization much better than I could express it. I told them after they read it that if that was their viewpoint they were welcome to become members of the American Patriots. If they did not coincide with those views we didn't care for them as members. I told them practically in every instance. I did not send any circulars by mail. I gave them to my friends and some to strangers. I have often expressed that in my opinion that the Draft act is unconstitutional. Regarding enlistment that *is* anybody voluntarily wanted to enlist that was absolutely up to them. In fact, if anybody believed that this war is right and that the Government is right in passing this draft act, they should enlist, and if I believed that this act was constitutional I would enlist immediately. That is my opinion and the way I expressed it. I never expressed it in any other way. I never had a conversation with any of the defendants on the subject of obstructing or resisting the draft act, at any time. I never communicated any ideas on obstructing or resisting the draft act to the defendants or to anybody else. I never suggested any ideas about resisting or obstructing the draft act to anybody at any time. I never
212 said *said* anything about resisting or obstructing the draft act any time. I never advised anybody not to register. I never advised anybody not to take the physical examination. I never advised anybody not to do anything required by the draft act. On the night I joined, July 21st, I became treasurer of the corporation. I requested Mr. Gray as a friend to open the books for me as treasurer. Mr. Gray at various times spoke to me on the subject of the American Patriots. I have never requested him to join. I have seen probably 75% of those who joined the American Patriots, off hand I should

judge probably 10% were within the draft age. I didn't know how many filed the so-called O'Connell exemption claim. I know of only two members who have been called to the colors. Those are Mr. Wacker and Mr. Donlon. On the night of July 21st I made a motion that the entrance fee be $5 and the dues $1. Prior to that time they were 25c. a month, and they couldn't get finances enough to cover the expenses. That is why the meeting adopted my motion. Miss Malloy was secretary at that meeting. Mr. O'Connell told those within the draft age to follow each step of the law and if anything came up that they did not understand it was to be referred to him. That they were to submit to the physical examination and to sign the paper required by the physician, a statement of their physical examination, but not to sign any papers that would put them in military service or to take the oath lest they would lose their civil rights. At various times I have heard Mr. O'Connell say that if they took the oath they would be subject to court martial if they attempted to resist in any way; that they would no longer be within the jurisdiction of the civil courts, they would have waived their rights in the civil courts by taking the oath as a member of the military. There were none who became members who ever came to headquarters or Mr. O'Connell's office so far as I know who did not say that they were determined to test the constitutionality of
213 the draft act, and no person ever became a member through me that did not first look over the circular and endorse it. They always signed the circular by signing the blank application at the bottom of them. It is Exhibit 11. Every person who became a member stated before they became members that they were determined to test the constitutionality of the draft act. The books show everything that was paid out. They have been delivered to the court and have never been returned to me. All the books and papers have been delivered to the court under subpœna from the District Attorney. Everything is shown on the books. Somewhere in the neighborhood of four to six hundred dollars was collected. Somewheres around $37 was the balance I turned over the books to the court. There was a controversy about the funds collected at Lodi. I could not state exactly but what Mr. Gray mentions was settled up and finished by Mr. O'Connell giving me somewhere in the neighborhood of $10, and the receipts for the printing bill and other bills that he had paid, and also for the filing of suits. Mr. O'Connell never received one cent for any service that he has ever done for the American Patriots while I have been treasurer, and there was nothing received by him before to my knowledge. There was no money in the treasury when I became treasurer except the collections of that first meeting. It went towards paying some of the expenses. The picture at the top of Exhibit 11 was a cut made from pictures on the walls of Daniel O'Connell's office.

Cross examination.

By Mr. Preston:

The circular letter was always given to everybody who came in the office to read. To my mind it was the quickest way to clear the

matter up to read that circular letter. They had to endorse that circular letter and sign the bottom of it before I would accept them as a member. I knew an individual could not test the law on $5 and $1 a month. I mean when I say they were determined
214 to test the law that a poor individual alone could not finance the legal battle necessary to test that all through the courts. I cannot recollect the language used by each one that led me to believe that he intended to test the law. I did not concern myself with the legal status of the question at all. I knew how it was to be accomplished, was to be handled by a lawyer but I did not concern myself as to the process or method. I did not inquire into their reasons for joining the corporation at all except that they endorsed the circular there and I think they believed the same as I did. They did not discuss with me the question of whether they wanted to go to war or did not want to go to war. They did not talk about what process they were going to use in their determination to test the law and I did not have any idea of how it was going to be done. Nobody told me how it was to be done any more than I have said here before regarding the circular and what Mr. O'Connell said at the meetings. One test case would be enough to test the law. I don't know what was to become of the other drafted men while that was going on. I had an opinion on it. My opinion was that they would have the same privilege as anyone else. If one man went out individually to test that law, he has that right, as I understand it from what this court says and the United States Attorney. Now if 5000 men individually go out to test that law they each have the individual right, and you could not accuse one of those men of obstructing the law because 5000 men did the same as he did. In all the thinking I have done on that matter it always occurred to me that if we got 5000 members who were within the draft age it would not be up to us, it would be up to the courts to facilitate the matter and decide the constitutionality of that law. The obstruction does not come from us, it comes from the courts. I did not consider for a minute that the people who joined the American Patriots, or we, were obstructing any law. I did consider that any member if he
215 wanted to, would have the privilege of refusing to report for service if notified. If we succeeded, or if the law was proven unconstitutional, we did not expect any member of the corporation of draft age to do military service. I did not expect any of them to go across the water prior to the question being determined. That is not the same as resisting the law. If their services were required by the government across the water I expected them to do as they pleased. I could not govern their actions. The purposes of the corporation are stated explicitly upon the circular. That is what I subscribed to. That is what I got everybody else to subscribe to who joined through me. Now if the District Attorney is trying to get me to say that there was any ulterior motive, absolutely no. The purposes of this corporation were to test the constitutionality of the draft act and other things mentioned in the circular. I don't think I am obstructing the draft act already. Henry Mettler, Mike Don-

lan and Wacker are members and Henry Mettler who have refused to answer the call to the colors, has the right to test the law if he wishes. I- don't need any more than one to test the law. An attorney does not need any more than one but just as I contended a while ago they have a right to test the law. I think this court said a few minutes ago you could take up a collection to protect an individual. If a man is of the firm conviction that he is not going to do a certain thing by joining an organization of which I am a member, can it be construed that I am inducing him to do anything. I did not help run the "Johnny Bull" wagon up and down the street. I was a member of the corporation when it was done and I paid the bill as treasurer. I did endorse the movement of the "Johnny Bull" wagon. I did not consider the effect on young men at all. The John Bull wagon would not have any effect upon the mind of a man drafted for service if he thought it was right to be drafted. I have not analyzed it at the present time and don't know whether
216 that wagon would cause a young man who was not up on these matters to question in his own mind the wisdom and policy of his country. I wanted the reader of the sign "John Bull and his agents are ruling and ruining us; what are you going to do about it?" to figure out in his own mind if he could, just where he was at when he read the signs on that wagon. My idea was then to join the American Patriots. My reply to your question what good would joining the American Patriots do to help run Johnny Bull out of the country, from conversations I would have with everybody I would meet that was usually the topic of conversation. Many times a man would say "I don't believe in this war" and he immediately turns around to see if there is a cop back of him. I thought we would have, and my firm conviction was, that the American Patriots would number about 100,000 in San Francisco. My idea is this, that the majority of the people in the United States are not in favor of this war. Now that is my opinion. It used to be and it is now. 100,000 in San Francisco would mean many millions in the United States, and if many millions joined a movement of that kind Congress would certainly reconsider. I mean that Congress at its next session would repeal the act, the conscription act. I thought probably the administration would obstruct and interfere with the draft act; that it would bring about such a result by the administration, the national administration. This court said that the people are the rulers. I am certainly over the draft age. I had no interest in going into this thing on account of the draft because I am older than the United States Attorney. If we had 10,000 members of the draft age in San Francisco, that would mean, speaking proportionately, many millions in the United States. An expression of public opinion of that kind would cause Congress and the administration to act upon the will of the people which is the law of the land. It would in
217 effect do away with this draft act because I believe that the law is unconstitutional. If they repealed it there would be no necessity about testing its constitutionality or unconstitutionality. No man in the United States is expected to do military service if he

doesn't want to. Whether any member of our organization would submit himself to military jurisdiction depends on whether the law becomes constitutional or not. I don't know what would happen to any member pending the decision. I don't even expect or think. That legal question was up to the counsel. I remember Mr. Mowry testifying. I did not put those exemption blanks before him. I told him, "Here are some of our circular letters, what do you think of them? Read them over." He was within the draft age. I knew it at the time. I handed the circulars to others in Colma who were within the draft age. We have three members from Colma. One is within the draft age. I don't know whether the 23 on the list from Lodi are within the draft age. It was approximately 10% of our members are within the draft age. The McCulloughs are not members. One of them used to be a member but he resigned. I don't know who our members are within the draft age and who are not. I am not giving all my time to this movement nor was I at the time I was arrested. I am a practicing physician. At the time I first joined for a couple of weeks I did give practically all my time trying to get the books in good shape. I expect nothing out of it. I was doing it for love of my country without expectation of any fee. I do not entertain any political view that led me to take this kind of action. I was opposed to the entry of the United States into the war. Prior to the entry of the United States into the war I had expressed myself on the merits of the case between the other belligerents. It was favorable to Germany. I am of German descent. I recognize we live in a representative form of government. It is supposed that
the majority rule. There was a majority of Congress in
218 favor of the entrance into the war. I think that the majority of them voted for it, voted against the stipulated promises to their constituencies. I did not help send out any messages against America entering the war or anything upon the subject. I can't prove corruption in the Congress in the interests of the war. I would not charge the president with being corrupt. I could not prove that either. I have not bothered my head about the cabinet. I would not say the present administration is in the hands of corrupt men. They might be misled. I certainly think they are unpatriotic. Their views do not coincide with mine. They are absolutely disloyal to the American constitution because of the draft act. I do not know the principles of international law involved in this war and have not made any study of that question. I have not made any study of the freedom of the seas. As a lawyer, no, in other ways I have. I don't know where the mailing list of this corporation is. I have seen it in the custody of young Serbin last. I don't know how or where or who furnished the names or the list. I made no inquiry of any of the defendants because I had no object. I think it was a little handwriting and a little typewriting. I never had anything to do with sending the literature out but I knew it was sent out. I don't know where. We did not organize the American Patriots in any other states and did not attempt to. We thought the American Patriots might result in a political organization. I

was not a candidate for any job. I did not show this legal opinion to members or to anybody outside of those who were just in the office with me. It was in the office.

The witness Dr. E. R. HOFFMAN further testified as follows:

Redirect examination:

I heard the testimony of Miss Barkley. She never prepared any petitions for me or for the American Patriots. I never had any conversation with the witness Mowry regarding our methods because I did not know what our methods would be. That was in the hands of the attorney. But in discussions on the subject
219 it was brought up regarding the taking of troops out of the United States and I made the statement that nothing but regular volunteer troops could be legally taken out of the country and that a man could even refuse to embark at the time of embarking.

Recross-examination:

I got that idea from the fact that nothing but volunteer troops can be taken out of the United States. I have always understood that. It was not suggested to me by Mr. O'Connell. I have had that idea in my head ever since I went to school. I have read through the address of Hannis Taylor to the Congress of the United States and the opinion of the Attorney General Wickersham given in 1912. I was a German sympathizer before the United States entered the war because I have a feeling for what I consider the under-dog; it looked to me like a gang fight. I didn't object to anyone else sympathizing with any of the other belligerents, yet I thought this country should remain absolutely neutral, and I always argued that the United States should not have traffic-ed in war munitions; it was brought out time and again to place an embargo on the traffic of war munitions and the administration said at that time that that could not be done, that it was out of the question. After the war was declared there was an embargo on food stuff going to neutral countries and I could not reconcile the two different attitudes of the administration. We had no quarrel. I was neutral before the war and before the United States entered the war. I didn't take any part on either side in any public meeting or any public societies of any kind advocating either side. I knew when I joined the American Patriots that there were bills before Congress for the repeal of the Conscription law. Several members of the American Patriots have responded to the call of the colors. They did not consult with me before they went. I don't know whether they consulted with Mr. O'Connell. The legal work of the American Patriots was left
220 to the attorney. The objects of the corporation I could not possibly express more clearly than they are expressed in the circular letter and that is what I subscribed to. The American Patriots was not expected and could not finance more than the two

test cases of Michael Donlan or the Mettler case which ever came first.

Recross-examination:

I don't know that there is anything in the draft act itself on the question where the troops shall be used. There may not be in the draft act itself. My understanding is that the draft act is unconstitutional because it calls for a service outside of the territorial boundaries of the United States, and the newspapers have led us to believe that. I cannot say that there is any word in the draft act about where the troops shall be used. I didn't tell Mowry that an injunction proceeding would be served at the time of the attempted embarkation. I didn't use the word injunction. I said nothing more than they had a right to refuse to go then. At that time there was nothing said regarding the members of the American Patriots. In the general conversation it was brought up that a man could refuse to embark, unless he was a member of the regular volunteer army. I have denounced the declaration of war. I never saw any motive in entering the war. I condemned the Lusitania incident and did not condone it. I have not upheld any German Intrigue or alleged crimes in our own country here. I have not upheld the diplomatic letters to divide our country between Mexico and Japan. I believe in the freedom of the seas. I did not endorse the sinking of hospital ships or Belgium relief ships or submarining or torpedoing me-chant vessels without warning or without search or without a chance for the noncombatants to get to a point of safety. In controversies over the subject I have said that it makes no difference which power, you can practically leave out the names of the belligerents and take it hypothetically, that if a power uses a
221 flag *to* another power to mask its own ships and after a submarine or a smaller vessel asks that vessel to heave to and they get alongside, then if the larger vessel attacks the smaller one, then I think the other power has a right to announce its intention of sinking without notice. I think the United States would have the same right. I do not believe that it was the right of any belligerent to attack an American vessel, and without a word of warning torpedo and sink the vessel, the cargo, the crew and the passengers without any chance whatever to escape. I believe in our form of government as it is intended not the way that it is practiced to-day. I don't think we ought to have a revolution here and I never said so. But I have said that if organizations such as the American Patriots were not allowed to take proper legal steps there would be apt to be a revolution. I meant by that if the people could not have their legal rights respected that the administration and those back of it would shove themselves into a war, although I would take part in one myself. If the American Patriots allows its members to each one go out and refuse to answer the call to military service and keep them from under the military service, and be punished only for a misdemeanor. I don't think that it would be the cause of a revolution here. My position is not that the object of the American Pa-

triots is to have any of its members if they so desire to refuse to enter military service and to resist the law and if it is upheld that they be punished for a misdemeanor only and thereby discharge themselves from any further obligation; and if it is declared void that the whole war, and our system of raising an army stop. That is not my position. My position is that if I were of draft age and the Supreme Court of the United States declared that law constitutional I would go, and I — teach members just exactly that. I don't know what the legal opinion says. The theory upon which the corporation was proceeding was not that all that can be done with a man for refusing to conscript, is that it is simply a misdemeanor and that
222 after he serves his term, if he has to serve it, that ends it all and he can never be required to do military service again under the act. I understand the legal opinion to mean that if a man refused to be conscripted under the Selective Service Draft Act he committed nothing but a misdemeanor if the law was valid and that after having served the sentence imposed his liability to military service then and there ends under the law. I did have a copy of the opinion on hand in the office not under seal. I did not show it to anybody. Nobody showed it to my knowledge. It was there as a matter of information to myself. There was no particular use I could make of it. The legal opinion does not express the objects of the organization. I made no use of the opinion. I didn't have it there for any purpose at all. I didn't bring it into the office. I think it was brought there by young Serbin who acted as our clerk and when he put the seal on it I asked him why he did that. It was the mere playful act of a child. Mr. O'Connell prepared the opinion in answer to the questions. The legal opinion does not state the initial purpose of the corporation. Those questions were asked him by a party and they were replied to. I haven't any opinion on the correctness of the law stated in that opinion. I know how Congress voted for the declaration of war but I had a well defined belief that the repeal of that act by the present Congress could be done very easily if there was strong enough public opinion against it. I believed that all the people who opposed that law, if they all voiced their sentiments to Congress, they would repeal the law. My faith was not particularly pinned on the next Congress instead of the present one. My idea is that members of Congress and everyone else keep their ears pretty close to the ground. I also based my opinion that it was unconstitutional for troops to go out of the United States on the information that the Supreme Court of the United States declared that no troops could be sent abroad
223 on conscription. I think it was on the Conscript Act of 1863. I learned about it in history in school. It can be found in the records of the Supreme Court I think. I have not tried to find the volume or page or chapter or verse or date. In addition to the opinion of Attorney General Wickersham that the state militia could not be sent out of the country, there is a decision of the Supreme Court. I cannot see where a government or a congress has the right to pass a law against the constitution. I believe a man's denunciation of a law should be restricted to a reasonable

and sensible and ordinary method of contesting the law, and I believe that it is just as legitimate for a man to parade these streets with banners saying that John Bull is ruling and ruining this country; or did Washington fight in vain? Join the American Patriots, and using 15 motion picture theatres and using 10,000 circulars more or less of the kind that appear in evidence and also this opinion; and also putting that clause in the exemption claim referred to and believe they are perfectly legitimate and just as legitimate as discharging men for refusing to buy Liberty Bonds, for putting posters all over the United States declaring you are needed for your country's service, or subsidizing newspapers. I think that the methods are legitimate. I believe that a legitimate way to test the law would be to have one case expeditiously started and expeditiously advanced for a hurried opinion and that the courts should do that, but we cannot move faster than the courts
224 will allow us, and we have had no chances to my knowledge to do so up to the present time. Attorney General Wickersham stated that his opinion was rendered prior to the Act of June 3, 1916, and that since the passage of that act his opinion was no longer binding.

Further redirect examination:

I knew that when he said that it didn't make any difference because an act of Congress could not change the constitution of the United States.

Exception No. 11

Mr. O'Connell: Now, at the time that you were expressing this opinion——

Mr. Preston: Which opinion?

Mr. O'Connell: That you just brought out.

Q. Now, at the time that you were expressing this opinion did you know that the Supreme Court of Pennsylvania in the case of Knieder vs. Lane 45 Pennsylvania State Reports 238 had declared the conscript act of 1863 unconstitutional?

Mr. Preston: To which we object upon the ground that it is immaterial, irrelevant and incompetent, and not proper cross-examination.

The Court: The objection is sustained.

Mr. O'Connell: We save an exception.

To all of which the defendants then and there duly excepted and hereby designate it as Exception No. 11.

The witness further testified: The various things asked me by the United States Attorney about what Germany did on the sea and so on is still disputed by Germany. It is a disputed fact whether she did or did not do these things. Germany says she is not guilty of these things about which I have been asked.

Exception No. 12.

At this point the following questions were asked and statements made by Court and counsel.

Mr. O'Connell:

Q. Was anybody who joined the American Patriots advised at the time not to enter the military service?

225 Mr: Preston: To which we object on the ground that it has been gone over and over.

Mr. O'Connell: It is what you have just asked him about again this morning.

Mr. Preston: But I have to have the last say.

The Court: He has a right to ask him on cross examination because he was asked about it this morning; but you have no right to repeat a thing you asked on direct examination. The objection is sustained.

Mr. O'Connell: We save an exception.

To all of which the defendants then and there duly excepted and now designate it as exception No. 12. At this point the following questions were asked, answers given and statements made by court and counsel, and witness.

Mr. O'Connell: As far as that was concerned, I understood that the advice given there that that was the law. I never saw the opinion given to Mr. Mengedoth and produced in Court until it was produced in Court. I remember some of the debates in Congress prior to the vote. I do not know of any other way of raising the money to test this act than by the use of the teams and moving pictures and the sending out of the circulars. The purpose of sending out the wagons and having the moving picture slides was to bring the people who believed as we did into the organization; that was my idea. There was no other purpose involved. I didn't expect to bring in anybody that believed differently. I didn't think that that would change their mind. I did consider the statements on the wagon and on the screens in the moving pictures true. I am still of that opinion. The American Patriots has not any means of securing funds with which to test the validity of this act and carry out its purposes except in this way. I have no means now to test the validity of these acts. If it relies on the present conditions of the American Patriots the validity of the act cannot be tested.

226 In my opinion any man who has one single ounce of real patriotism would do anything in his power to prevent and stop this war.

Miss L. D. HARDING was duly sworn and testified as follows:

Direct examination.

By Mr. O'Connell:

I am a stenographer and typist working in the City Hall and on the evening of August 21st attended a meeting at Dreamland Rink and took down some of the speeches including the speech of Daniel O'Connell on True American Patriotism. I took it all and afterwards wrote it out and I have here a correct transcript of my minutes. I did not report the speech for Mr. O'Connell. He did not ask me to report it and had nothing whatever to do with my reporting it. At this point the transcript was offered in evidence to which the prosecution objected but it was duly admitted and marked defendant exhibit No. C.

DAVID JAY SMITH was duly sworn and testified as follows:

Direct examination.

By Mr. O'Connell:

I reside at 52 Page Street and am a brother of Herman B. Smith. The first time I saw the defendant Dr. Hoffman was after his indictment and arrest. I may have seen him before but not to have noticed him. I had no communication with him in any way, shape or manner before that. I saw Mr. Carey at the same time but have never had any communication with him before that. The first time I saw the defendant Wacker was at the Humboldt Evening Hight School four or five years ago. We went to school at the same time. I left there about 2½ years ago. The first time I saw him since I left school 2½ years ago was at a meeting at Dreamland Rink July 3rd, 1917, when I said hello to him. In the mean time I had no communication with him in any way, shape or manner. I didn't speak to Mr. Wacker until after the arrest of the defendants in this case. I was born in Cleveland, Ohio, and am 19 years of age. I had no communication directly or indirectly with Mr. O'Con-
227 nell until I came to his office early in July. At that time I had no talk with him on the constitutionality or unconstitutionality of the draft act or anything on that subject. The occasion of my visit to Mr. O'Connell was to secure him as attorney to defend Louis Serbin and I was recommended to Mr. O'Connell and went down to see him with Louis Serbin's brother. Louis Serbin was then under arrest and at the city prison. The next time I saw Mr. O'Connell was July 13th. I went down with my brother to his office to sign the articles of incorporation for the American Patriots the day following the preliminary meeting. I had not been at the preliminary meeting and know nothing about it until my brother came home and told me there had been such a meeting, and he had agreed to be one of the incorporators for the American Patriots which would have for its object the testing of the constitution-

lity of the Draft Law. I went down that day and a few people who were to sign didn't appear and I volunteered to sign because I believed the Draft Law unconstitutional and wanted to see the law tested, and also because I agreed with the other objects in the Articles of incorporation, such as having a two-thirds vote of the people on a declaration of war, and instituting the initiative and referendum and recall in the Federal Constitution; I believed they were more important and I told Mr. O'Connell so, than even the testing of the constitutionality of the draft law. Myself and brother signed the Articles of Incorporation. Mrs. Krause's name was on the paper when I signed, as also was the name of Mrs. Manley. Mr. O'Connell had not signed. He wasn't there when my brother and myself arrived and signed. I believe we waited until he returned. After signing we went before the notary public on the 5th floor of the Pacific Building and that is all that I remember on that occasion. The next time I saw Mr. O'Connell was at the first meeting of the American Patriots after the charter for the corporation was issued by the state. It was in the assembly hall of the Pacific Building. Myself, my brother, Mrs. Krause and Mr. O'Connell were there and about 30 or 40 other people. Those were the only defendants
228 that were there that night. The objects and purposes of the corporation stated that night were mainly to test the constitutionality of the draft law; to amend the Federal Constitution so as to include the initiative, referendum and recall, and also to make it impossible for Congress to declare war unless there was a two-thirds vote of the people ordering it. There was a great deal said that evening. I spoke on dues. The consensus of opinion that night was that they should be made as low as possible. I remarked to my brother that most of the people were not of draft age. There were women and men there. After that meeting that night at the Pacific Building neither my brother nor myself had anything whatever to do with the American Patriots. We never attended another meeting. We never went to headquarters. I didn't know where the headquarters of the American Patriots were until I learned it in court at this trial. After that night I didn't have any communication directly or indirectly with Mr. O'Connell about the American Patriots or the subject matter of the American Patriots. I didn't see the legal opinion, nor any of the circulars or any of the documents issued by the American Patriots until it was produced in court at this trial. I never sent out any of the literature, and didn't have anything to do in any way, shape or manner with the American Patriots. My brother resigned as a member of the American Patriots at the first meeting after the incorporation. We both resigned at that meeting. We tendered our resignations that night. Mrs. Krause was elected secretary in place of my brother on that same evening. None of the circulars of the Socialist Party literature that have been put in evidence belonged to me. I am secretary of the Jack London Memorial School; the Socialist Party at that time met in the building; 5,000 copies of that majority report, or the war proclamation of the Socialist Party was ordered by the Socialist Party to be brought to the building; a meeting was scheduled for the Moose

Auditorium on June 3rd; the secretary asked me to bring
229 the literature down to the Hotel Fresno according to arrangements she had made with the management of the Hotel Fresno and leave it there until the next evening, so that it could be distributed at the Moose Auditorium meeting. The only thing I had to do with that literature was to bring it to the Hotel Fresno and leave it there. By the way, I wish to say that the next evening I went down with the secretary of the party to get the literature and help her pack it up; in view of the fact that Mr. Bankson had left for his ranch we could not locate the literature and consequently it was not distributed that evening at the Moose Auditorium. Mr. Bankson had left and did not notify the clerk of the hotel where he left this literature so it was never distributed. About 20,000,000 copies of that literature have been distributed throughout the country. I believe it was the same literature that was before Judge Rose in the case in Maryland. I know of this through the Socialist Party literature publication. I was at the Dreamland Rink meeting on the night of July 3, 1917. I know of my own knowledge that the petition which Miss Kearns testified to and read was adopted and was afterwards sent to the President of the United States. I saw my brother type it and mail it. There were petitions addressed to the President and to Congress. The following morning they were mailed. I believe that there was a letter sent with the petition explaining that the meeting was held.

Cross-examination.

By Mr. Preston:

I resigned from the American Patriots by stating in the meeting that I wished to resign. That evening there was a temporary Board of Directors elected in the place of those who had resigned, for my brother and myself. The minutes of the meeting are very imperfect. I merely got up and tendered my resignation. I didn't have to present a written resignation. At the time the question of dues came up the discussion as to directors was not on. When the meeting was about two-thirds over the matter of directors and the
230 election of directors came up and I stated that I wished to resign in view of the fact that I had no time to give to the organization of the American Patriots. I never was secretary. I felt that others there who had more time to give to it could do so more conveniently than myself. I stated I had too many things on hand. I didn't give the matter of financial responsibility any serious consideration. I was a director as well as a member. I tendered no written resignation. The resignations were accepted without vote. To the best of my knowledge the people voted on every question. Mr. O'Connell did put the question this way, that if there is no objection to the resignations of the Smith boys they will be accepted. I resigned because I was working at that time and going to law school in the evening; I was secretary of the Jack London School, I belonged to four or five other organizations and all of them took up

every bit of the spare time I had and I could not give it any time. I joined for the purpose of forming the organization for the purpose of testing the constitutionality of the draft law, because I believed the law to be unconstitutional; I voluntarily committed myself to the purposes of the organization. I resigned because I don't believe in belonging to any organization that I cannot give my active time to. I have made that a policy and have kept it. The Socialist Party of the United States stands pledged to the very self same things; I am an active member of the Socialist Party, the Young Peoples Socialist League and the Socialist Propaganda League. These organizations stand pledged to the very self same things. I am actively working in these. I wanted to see an organization formed that would have that purpose. I didn't tell them to come into the Socialist Party and do it all there because it is a policy of the Socialist Party not to admit people into the organization who are not socialists. People may be opposed to war and still not be Socialists. They may favor a referendum on war and still not be Socialists. We do not want non-socialists in the Socialist Party.

231 At that time there was practically no policy outside of the articles of incorporation. I didn't resign because I didn't like the way things were going. A discussion came up about dues. I did state at that time that I did not see how it was possible how to get sufficient funds to bring a test of the draft law before the Supreme Court on 25 cents a month dues. I did have it in my mind when I was making the speech on dues to resign. I thought it my duty to enter into the discussion on the proposition I thought would be beneficial to the organization. I know the procedure necessary to amend the constitution of the United States. I didn't intend the amendment of the constitution to be made while the present war was on. I didn't believe and don't believe now that the purposes of the organization would of themselves necessarily cripple the efforts of the United States in the present war and such a question never entered my mine until I heard it discussed here in the court room. Any time is an opportune time to urge important reforms. I have been in favor of the very same things in the Socialist Party for the last seven years. I didn't think the entering of the war was a good time to start it. My brother and myself were going down town for the purpose of signing the articles of incorporation as he agreed to do the night before. We went down and waited for Mr. O'Connell. There were two names signed to the articles of incorporation. Another person was supposed to come and sign but did not come. I didn't know who it was and I was asked to sign the articles of incorporation and believing in these principles I signed them. I would not say that I was a public speaker but have made speeches in a debating society. I have made no public speeches on the draft law or our declaration of war. I have discussed it among friends and no more. I am opposed to war in general. I was opposed to the United States entering the war. Since the United States entered the war my policy has been mainly watchful waiting. I cannot see how one individual can contribute much to the success of such a gigantic

proposition, as the success of this war. I don't think I have
232 done any harm. I have been active in the Socialist Party, the Jack London School and Socialistic organizations only, including the Socialist Propaganda League and the Peace Council. The object of the Peoples Council is to establish after the war is over, or to work to establish when this war is over an international court of arbitration which will make future wars impossible; also the idea of limiting armaments or decreasing the armament of the United States. I believe it is the duty of American Citizens to urge that these democratic measures be adopted after the war. I am not an active member of the Peoples Council. My brother is secretary but my brother and myself do not agree on most matters. I have been in the Peoples Council. I never applaud at any meetings. I believe that the Peoples Council were right when they endorsed President Wilson's policy of stating that the best way of settling this war was to settle it without victory for either side. I believe in that policy. I also favor the repeal of the draft law. I have not stated definitely that this war is a nonsensical war, in the interests of the rich against the poor, and the time to settle it is right now, and the way to get out of it is to back up. I don't claim to understand the underlying principles of international law and the international rights involved in this war, I do not claim to have possession of all the information that is in the possession of the Department of State in regard to the true conditions surrounding this war. I am noticing day by day revelations of matters here that vitally effect the safety of our country, but I am opposed to all wars on the ground that it is murder to kill people, in war, or to kill them individually. I have taken the position as a Socialist that all wars are necessarily capitalistic wars. That they are necessarily so. You see, we take this position as socialists, that we believe that—I do contend that it has been admitted during the war that this war is a war of trade; it
has been admitted on the part of the Allies that Germany
233 entered this war for trade purposes and—I never have examined very carefully the leaflet No. 5 of the Socialist Party put in evidence here. While I am a member of the Socialist Party organization I don't read all the literature. We moved the literature down to the Moose Auditorium so it could be distributed, not to keep the Unitd States government from seizing it. When I went down to the Hotel Fresno and rented a room I was obeying instructions from the secretary of the party. I was not secreted in that hotel for the purpose of preventing the government from seizing it not was I told so at the time. The first time I heard of it was when Mr. Rathbun said so on the witness stand in this case. Registration Day was June 5th, and we intended to circulate the literature at the meeting of June 3rd. I was at the hall as an usher. I didn't see the part of the circular which says they were to resist all industrial and other kinds of conscription. I didn't read that part of it which says: "we brand the declaration of war by our government as a crime against the people of the United States and against the nations of the world." Mr. Preston this sarcasm of yours is all nonsense. I

insist in being treated like a gentleman. Well, this question could be asked me without all these adjectives. I stated point-blank that I had not read that literature. I have not read that leaflet No. 5 or No. 6. I study law and I give most of my time to the reading of all matters contained in the law books. I have not had time in the last two years to deal with any matters outside of legal matters other than reading a few novels or plays now and then. I know there is a law against seditious literature and utterances. I have absolute*ly* faith in the Socialist party and don't believe they would distribute any literature that was seditious and that is why I aided them in distributing their literature. I didn't hear my brother deliver his speech at the meeting of July 3rd. I was in the hallway. I heard them read here. I don't endorse my brother's statements entirely. The main purpose of the meeting was not to collect money for the support of conscientious objectors. I didn't know at
234 that time what my brother had stated. I didn't hear him make the statements the United States Attorney read in evidence. I never heard those statements now read. I knew the brother of Louis Serbin as a member of the Workmen's Circle, a Jewish Fraternal order that meets in the Jack London Library Building. When I went with him to Mr. O'Connell's office I didn't know what his brother was arrested for. I learned it after Mr. O'Connell had appeared in his behalf. His brother didn't know either. On the night he was arrested I went to the Chronicle Building and found he had been arrested. No one knew why. I got in touch with the Serbin family and told the brother he had been arrested and agreed to meet him in the morning and we went down to engage Mr. O'Connell as counsel. Mr. O'Connell went out and found out about the matter. Before that I didn't try to find out what he was in jail for, any more than what I have said. Somebody recommended Mr. O'Connell, I think it was Mr. Serbin's own brother. I am absolutely sure I didn't recommend Mr. O'Connell. I don't know who recommended him. I think Serbin's brother told me he wanted to go down to Mr. O'Connell. I have not talked with Serbin about it. I went to Mr. O'Connell's office with Serbin as a friend of Serbin's. I had no personal business with Mr. O'Connell when I went down to his office at any time except in seeing that Mr. Serbin secured counsel because I believe every man deserves counsel and a right to trial and a proper defense as an American right. It was the business of the counsel to find out what he was charged with. I didn't know. I would do the same thing for any man I would know. I think I have sent four of my friends down to Mr. Yost on civil cases. I heard him speak at Dreamland Rink and met him at Mr. O'Connell's office. Personally they are pleasant people and I like to meet and know pleasant people. I don't know of anybody else for whom I hunted for a lawyer except that about six months ago I helped to secure counsel for a man arrested in the Police Court for something. I
didn't see any of these wagons going up and down the street
235 nor any of these slides at the moving picture shows. I hired the room at the Hotel Fresno for the Socialist Party and they

paid for it. The Secretary of that Party paid the bill personally. I was not told that I could not sign the articles of incorporation because I was under age. I didn't give my address as 50 Fulton Street. Mr. O'Connell didn't ask me my address and I don't know where he got the address. My address is 52 Page Street and has been for quite a number of years. It is an apartment, and has not been the headquarters of any organization whatever. Mr. Minor when he first came to town stayed at my house for a little while. He is an artist and cartoonist and connected with the Mooney defense. I never made speeches in Jefferson Square. I talked to some friends in Jefferson Square Park four or five years ago. I cannot remember what it was about. There is no Socialist Hall out there. I am not an anarchist, and never studied the subject or gave it any consideration. I am not an I. W. W. I know its principles. I endorse the principle of industrial unionism which means that the workers should be organized according to their industry instead of according to their particular craft. Mr. O'Connell didn't ask me my age. I was not present on the afternoon of August 8th when Mr. O'Connell was arrested at the Peoples Council. I don't believe I was ever arrested. I didn't know the warrant covered my case until three or four days afterward. It was in the papers on the second day. I didn't come up and surrender myself because I was looking for bondsmen but was not evading the warrant. I didn't know for two or three days that the warrant was out for my arrest. I knew that a warrant was out for me. I don't think I was in Mr. O'Connell's office during any of that time. I think I telephoned to Mr. O'Connell from the Jack London Library and told him that I had secured my bondsmen and would be up to the Commissioner's office at two o'clock and he agreed to meet my brother and myself at the Commissioner's office. We met there with our bondsmen. I am not employed at the
236 Jack London Library. I don't know that the marshal had been there looking for me. There had been some people come there and ask for me while I was out; the girl who is there in the day-time said I would be there in the evening. They never stated their business. My mother said the Marshal had been looking for me. Somebody came there one day and asked for a meal and put it on the ground that he was a socialist and my mother gave it to him. My mother said some man had come to the house and claimed to be a socialist and he wanted to see my brother and myself; He claimed that he had come to the city recently, and he wanted a meal and my mother gave it to him. I know that the Deputy Marshal had a warrant for me and supposed they were looking for me but was not so informed. I was at the library at the usual times that I spent there but I worked in the day time for a jewelry concern as a collector in Oakland. I have been working for them four weeks. I was never evading the process of the law. I worked for an installment jewelry house and we did business with all the automobile shops in Oakland, at the various cigar stands there, at one of the clubs in Oakland, and various other places. I didn't know that the warrant was out for me or that Mr. O'Connell had agreed to produce

me at the time I was arrested. I did know that a warrant was out for me. I believe I had a right to look up bail; I knew that if I was arrested and put in jail nobody could look for it for me as well as I could myself. I have lived here in San Francisco for nine years and wouldn't run away. My brother and myself do not agree on political questions. Mrs. Krause was not with us when we went down before the Notary Public. My brother, myself, and Mr. O'Connell went down. I didn't notice that the date of the articles of incorporation was July 12th and the actual signing of them was the 13th. I don't know now.

Exception No. 13.

At this point the following questions were asked and statements made by witnesses and counsel and exceptions taken.

237 Redirect examination.

Mr. O'Connell:

Q. When you were having that literature in your possession, the Socialist Platform, did you know that Judge Rose of Maryland, of the United States District Court in Maryland, had made a decision that the literature was not *desitious*?

A. I read——

Mr. Preston: To which we object.

Mr. O'Connell: Let him answer the question.

Mr. Preston: May I make an objection. Will you give me permission in writing to make an objection?

The Court: Mr. Preston, address yourself to the Court; I don't wish any such exchanges between counsel.

Mr. Preston: Well, I didn't mean to give any offense to the Court. We object to the question on the ground that it is a clandestine and a covered attempt to do what your Honor has ruled could not be done, and furthermore, this defendant has testified he didn't know what the literature contained.

The Court: The objection is sustained.

To all of which the defendants then and there duly excepted and now designate it Exception No. 13.

HERMAN B. SMITH was duly sworn and testified as follows:

Direct examination.

By Mr. O'Connell:

I was 21 years of age July 11th, 1917. I first saw Mr. O'Connell at the time I was arranging the meeting of July 3rd. I went to his office to ask him to speak on the constitutionality of the legislation before Congress. At that time Mr. O'Connell told me that he was going out of town. I got Mr. Yost instead of Mr. O'Connell. It

must have been the latter part of July when I first saw Mr. O'Connell. The first time I saw Dr. Hoffman was after we were arrested. I didn't know him before that time and don't recall seeing him. The first time I saw the defendant Carey was after we were arrested in this case. The first time I saw the defendant Wacker was at the Humboldt Evening High School. We always disagreed and after
238 we left school the first time I saw him was in the hall way at the meeting of July 4rd and I just said "Hello" to him and left him, and the next time I saw him was when we were arrested together in this case. It was two years prior to the evening of July 3rd that I last saw Wacker. I never had any communication with him directly or indirectly between those dates. After July 3rd the next time I saw him was after our arrest. Between July 3rd and the time of our arrest I had no communication directly or indirectly with Mr. Wacker and didn't even know he was a member of the American Patriots. I never had any communication directly or indirectly with the defendant Carey. Since we were all arrested in this case I have not spoken much to him. I had no communication directly or indirectly with Dr. Hoffman until after we were arrested. When I went to get Mr. O'Connell or Mr. Yost to speak I didn't know either of the gentlemen. Somebody told me they were good speakers and lawyers and I went up to ask them to speak. Mr. Yost agreed to speak but Mr. O'Connell said he could not as he was going out of town. That is all the conversation I had at that time. On the afternoon of the same day or the next day I had another conversation with Mr. O'Connell regarding the threats that were made in the newspapers against the meeting that was held on July 3rd, the re-declaration of Independence mass meeting. The papers were set against anybody who took part in it. I went to see Mr. O'Connell about it and we talked the matter over. I understood from my studies that we had a right to hold a public meeting and didn't see how we could be interfered with. Mr. O'Connell reaffirmed me in my belief so I went ahead with the meeting. I issued a statement in the "Daily News" saying that the meeting didn't contemplate anything illegal, or resist any laws, but was merely for a petition of grievances to Congress, the "Daily News" and "Chronicle" I think, carried that report. At that meeting of July 3rd we presented a petition such as was read in evidence by Miss Kearns. At that time I didn't know there would be any prosecution. I never dreamed about it and therefore I didn't preserve a copy. I sent a
239 copy of the petition to Congress and to the President and to some of the Senators and some of the members of the House. I think I sent eight copies in all, so that it would be sure to get to the proper authorities that I wanted to reach. I think there were about 6,000 up at the meeting and they all voted in favor of the petition. It was read at the beginning of the meeting, and I asked everybody that spoke to address themselves to the petition. At the end of the meeting we took a vote on the petition and I sent it the next morning. The vote was a rising vote and everybody I presume stood up, I guess even the Government Agents stood up, because they did not want to be conspicuous. I was informed that there were re-

porters there to report the meeting. I invited them to the platform. I noticed in the audience a young lady sitting next to Rathbun. I invited her to sit up in front. She is the lady who has already testified here, Miss Kearns. She was too modest to accept my invitation. I sent away the petitions. I don't know the exact time that I saw Mr. O'Connell. I attended the preliminary meeting of the American Patriots. Somebody told me that there was to be a meeting. That was how I came to the meeting. On the night of July 12th somebody told me there was to be formulated plans for some kind of an organization. I didn't pay particular attention to what it was; I went along and I came to the Assembly Hall of the Pacific Building and there I met Mr. O'Connell and Mrs. Manley and Mrs. Krause and a number of other people, Mr. Yost and quite a number. There was a number of old men and young men and women there and when the meeting was called to order Mr. O'Connell stated the purpose of the meeting, it was to form an organization to test the constitutionality of recent legislation that was enacted by Congress. Mr. O'Connell made a number of statements there and a number of other people made statements. I think it was Mrs. Manley who got up and stated we should have a plank for suffrage in the purposes of the organization because she be-
240 lieved that the women should have a right to express their opinion because the motherhood of the land was the one that was going to suffer from the war and that they should have a right to have something to say about the declaration of war. Somebody else stated that they believed that the war should not be declared except by a vote of the people; somebody else said they should test every other piece of legislation passed, that the initiative, referendum and recall should be embodied in the United States Constitution, that we should work such an amendment to the Constitution; there were a number of statements made at that time, I just can't recall every one of them. All of the items that are to be found in the articles of incorporation were suggested by somebody in that meeting and there were many others that were thrown out as being unwieldly. Nothing could be done with them. Somebody made a motion that we incorporate an organization to be known as the American Patriots which was to be organized the next day and everybody interested was invited to come up and sign the incorporation papers. A number of people volunteered, among them Mrs. Manley and Mrs. Jrause, who was known to me as Mrs. Malloy. I volunteered and a number of others, I don't recall all the names at the present time because they have not been recalled to me and I have had no occasion to recall them. One of the ladies stated she had a couple of her sons or nephews or somebody subject to the draft and she wanted to do something to help them out. I don't know whether she said to keep them from going. She stated that the law was unconstitutional and that the war was wrong. I think it was Mrs. Krause that said the war was wrong. She was a pacifist. She didn't want her boys to go to war; she was praying to have something done to help them out. Everybody there that came together had the idea of doing something, not the idea of obstructing any laws but

simply the idea of testing the constitutionality of the law. I never hears anything else about any idea except to test the constitutionality of the legislation. It was not only Mr. O'Connell but eve.y-
241 body in the house who desired to talk, and there were quite a number of them, that endorsed the remarks and by the applause of the rest that evidently was their opinion too. The enlistment proposition did not amount to anything at that time; it was the draft proposition that amounted to something. It was stated that all those that wanted to go to war and believed in it should certainly go ahead; nobody objected to them. it was only those people who were looking forward to testing the constitutionality of the law and could not do it by themselves would ask what they could do. So far as anybody coming in there and saying they wanted to get out of the draft themselves and wanted to evade it, I don't recall anybody making any such statement or anybody going up there with such motives. It was frequently stated that all those that desired to go should go. I don't recall anything said about universal training or service. The next time I saw Mr. O'Connell was the next day at his office. My brother was not at the meeting, at the preliminary meeting of July 12th. At this point the United States Attorney said that he didn't claim that the brother was there, and made no dispute about what took place at the meeting. The witness resumed his testimony as follows: We were supposed to be at Mr. O'Connell's office at 11:00 o'clock or noon. Mr. brother came along with me, Mr. O'Connell was not there and I waited for him to return. The Articles of Incorporation were already signed by Mrs. Malloy and Mrs. Manley or bore their signatures. My brother had volunteered to sign because somebody had failed to appear who was supposed to sign. We went down before Henry B. Lister and were sworn to our signatures. At the time I was asked to act as temporary secretary and I did. I don't think I ever took any minutes down. At the next meeting I resigned with my brother, we both resigned at the time verbally, I declined to act further as secretary and withdrew from the organization, and never attended the meetings since. It was accepted and Mrs. Malloy was elected
242 as secretary in my place. That was the meeting after the charter was granted. All the signers of the incorporation papers with the exception of Mrs. Manlay were present at that meeting. I think there must have been 35 or 40 people. After the articles of incorporation were published in the newspapers Mrs. Manley and Mrs. Krause had a controversy about it. Mrs. Krause told me that Mrs. Manley instructed her over the telephone to sign those papers for her. The purposes of the organization were again stated for the benefit of the new people who had come in since the preliminary meeting. The newspapers had given announcement of the meeting which was to be held; Those gathered asked the purposes of the organization and they were stated by Mr. O'Connell. At that time a motion was made that the dues be 25¢ a month. There was a discussion for and against. My opinion was that the dues should be as low as possible because I was not interested in anything except testing the constitutionality of the laws and following

the other purposes of the organization and I thought the more persons that get into an organization the better it would be, the more force it would have when it came to the notice of the public officials, and as I was in favor of low dues. After that I resigned. I resigned from the organization not because I did not think that the work it was taking up was not what I wanted but because I had an offer from the Peoples Council which I accepted, and I thought that the Peoples Council was broader and had a bigger field and so I went to work for the Peoples Council as Secretary instead of working in the American Patriots. After that meeting I had nothing whatever to do with the American Patriots and I didn't go near their headquarters. I had no connection with any of the officers and knew nothing as to what was done after that. There was nothing done at the time I was in the organization. I left the American Patriots absolutely that night and it was my intention to leave them and I did. My brother did the same thing. I know that this literature of the Socialist Party came to the Socialist Party and my
243 brother was asked to bring it down for the secretary and he did it as a favor to her. I know he took it down there.

Cross-examination.

By Mr. Preston:

I have not thought about whether I shall be called upon to register before the war is over. I have no brothers other than Dave and he is only 19. I have no relatives in the service or subject to the draft act. My mother is a Russian Jew and my father was a Russian Jew but he is dead so long I don't know. I am a socialist and have been for seven or eight years. Before the war I was as much against German Democracy as I was against English Plutocracy. I took no sides. I was always in favor of peace. I didn't see where nybody had anything to gain out of the war. I made speeches before we entered the war in favor of America maintaining her neutrality. I was in favor of the United States acting as a mediator. I agreed with President Wilson at the time he tried to act as mediator in the war. I favored an embargo on arms. I made no speeches on that. I read Mr. Lansing's reply to the Austrian Government on the question of an embargo on arms or extracts from it. I have studied international law as far as a layman could that is in general observation on the political situations of the world. I don't know how many speeches I made on the draft act between May 18th and June 5th. I made one at the Moose Auditorium and one at Dreamland Rink. After that I spoke to smaller gatherings around the bay. I spoke in regard to the conscientious objector; (If you know what a conscientious objector is you will know what I mean if you don't, I will explain it to you. I think that that was the only time I mentioned financial aid. I didn't think the conscientious objector had the right to resist the law. I thought the conscientious objector had the right of his conscience just as much as the religious objector who was recognized. If he thought in his own conscience and his own heart that he could not take part in any war, that he

could refuse to go. I always said that the conscientious ob-
244 jector has the right to his opinion as anybody else, whether he be an official or an ordinary citizen. I always said that the conscientious objector has the right to his opinion just as *might* as Mr. Preston here has the right to his opinion. I never bothered myself whether he had the right to refuse to go to war. I know conscientious objectors did refuse to go to war and they considered their conscience is violated if they would go to war and I recognized that as a fact. I didn't take the ground that a conscientious objector had the right to refuse when called. I took the ground of the conscientious objector who did refuse to respond and not whether I thought he had a right to refuse to respond. I was talking on behalf of those who had refused to respond, and not on behalf of myself as I wasn't old enough to go in that draft. I don't think I do believe that the law that requires all citizens to become a part of the army and navy a just one and if you will not allow me to explain or tell why I will withdraw that answer. I require a reservation to explain my answer. I don't believe in the forcible resistance to such a law should its enforcement be attempted. I don't believe in starting a revolution myself or in advocating the starting of one, but I think if a person was opposed to it conscientiously that he might resist it but that is up to him to decide what he might do. In a democracy I deny the legal right to conscientious objectors and everybody else who are able-bodied to do military service. I don't understand that the exceptions made by the law are exceptions in the interest of and for the benefit of certain persons and do not exist as matter *or* right. I do not understand that these exceptions in favor of certain persons or classes of persons are exceptions in their favor that the legislative body is not required to give. I think they are required to give it because they have given it, and that is evidence they are required to do so. I think that the religious ob-
jectors who have been recognized have only been recognized
245 because they suffered such persecution during the time of the Civil war during the other draft period. I am not in favor of supporting any man who will refuse to go to war. I hate cowards. When I said (quoting what was read by the U. S. Attorney) I said that was what the boys said. I was speaking about the conscientious objector. I was in favor of supporting any man who on the ground of conscientious objections would refuse to go. I admire him for having the conscience. I didn't recognize that the law requires such a person to go. The law has made exceptions for conscientious objectors. When I made that speech of July 3rd there was lots of talk in the newspapers by the President, and by the Cabinet and members of the House that conscientious objectors would have the same rights. A bill was to be introduced in the House and Senate giving the conscientious objector exemption, and that was only to help along in that work that I said these things. I didn't intend to support any man who refused to go to service; only the conscientious objector. The law was not completed when passed by Congress. It was left to the interpretation of the President then. The interpretation of exemptions had not yet been made.

The description of religious bodies and the churches was made after that speech was made. It didn't classify what would be the ground for exemption on religious grounds. A lot of people are religious people and they only recognized lately in the last interpretations only certain religious objections while there are other religious groups that have the same objection. I don't recall just what words I used in my speech. I did say that the Government has asked you to buy liberty bonds, finance the war and equip our boys to be maimed and killed. But we want to save our boys at home, to save them from going to that Hell in Europe. I think war is Hell. I had in mind the conscientious objector. I never objected to anybody who wanted to enlist to go. There was an organization organized in New York known as Civil Liberties Bureau, that was
246 going to help the conscientious objector and put in motion legislation to Congress. A number of Congressmen and Senators belonged to that organization. That speech was made in order to support the resolution and motion that was introduced in Congress. At that time there was no contemplation of organizing the American Patriots. The American Patriots was not the result of that meeting. You can recognize a conscientious objector any time you talk to him; you can see it in his eyes and you can feel it when you talk to him. I didn't leave the matter of the conscientious objector to the wisdom of the authorities who are carrying out the laws because I am a part of the United States and they had that matter up for consideration and I wanted to urge my viewpoint and I had a right to express it. I cannot help it if anybody is going to hide behind that mask; if some takes advantage of some one else's sincerity. There was not any idea about hiring lawyers or making bonds; there were enough lawyers who volunteered to take up those cases throughout the East; that was published in the Militarism paper. I heard the Rev. Whitaker say that it is better to go to jail in America than to go to Hell in Europe. He is a minister of a church in Los Gatos. He teaches his boys that war is wrong. His boys are conscientious objectors and on behalf of them he wanted to get help. I enjoyed the frankness of the Rev. Whitaker and thought his bravery in making that statement was commendable, but I did not endorse the sentiment on any subject. I just said he had a lot of spunk to get up and say such a thing. In my speech I read a part of President Wilson's speech where he took a stand against war when he was running for re-election and stood on the doctrine of peace and was elected because he was in favor of peace and not in favor of war and I just showed the reversal of his sentiments. I didn't have to do anything to make the audience believe that he was a hypocrite because they came out there believing so. I believe President Wilson is a sincere man. I like his English. I
247 don't think that any corrupt influences have got to him in the shape of money but I think he has been influenced by his surroundings. A man takes on his environments; I think that President Wilson has had the environment that would just lead him to take the action that he did, however, I never contended that he was a hypocrite because I may sometimes change my mind about

it, and I reserve that right; at the same time President Wilson was elected on the proposition that he kept us out of war; that was his slogan; and everybody voted for him, and I know that a lot of people deserted the Socialist Party and voted for Wilson because he kept us out of war, but he didn't do it, and I just pointed out the fact, and that was all. I hate Germany just as I hate any other military autocracy in the world. It says in the circular that the Peoples Council of America, representing so many people, favored the idea of no annexation and no indemnities; that the Workmen's and Soldiers' Council of England does the same thing, representing so many people, and it says further that the majority of the German people also do it. This was issued in New York and I had nothing to do with drawing it up. My name is on it as recording secretary. It favors the repeal of the conscript law and upholding the labor standards. I think that all war is a crime. I think that human life was not made or produced on this earth to be sacrificed for any rulers. As a member of the Socialist Party I endorse the Socialist doctrine contained in the Socialist circular put in evidence from the Hotel Fresno. That literature was gotten up by the convention in St. Louis, in April, and it was voted upon through a referendum of all members and it has never been found treasonable or suppressed to my knowledge. I have read it and am familiar with it. I endorse the general tenor of it although I might not endorse some pieces of it. I endorse it altogether and the statement "We brand the declaration of war by our Government as a crime against the people of the United States and against the nations of the
248 world." I endorse it for the reasons stated before. I believe that this is an unjustifiable war as all the rest of wars. I think the nation expressed itself against war and therefore it is a dishonor for the men who have been elected by the people to turn around on the people and do the opposite thing. I think that it is the right of every American citizen to criticize and to have meetings and to petition Congress on the war or any other public question. I favor the idea of letting the voice of the people be heard and that statement in the circular which reads "In harmony with these principles the Socialist Party emphatically rejects the proposal that in time of war the workers should suspend their struggle for better conditions. On the contrary, the acute situation created by war calls for an even more vigorous prosecution of the class struggle and we recommend to the workers and pledge ourselves to the following course of action: Continuous, active and public opposition to the war, through demonstrations, mass petitions, and all other means within our power." I endorse active and continuous opposition to the war; nothing secret or hidden; everything done through an open and legal process. I was against the war before it started; I was against the European War before it was started too. I was against the war of 1812. My idea is that if it is public and open that therefore men will do things legally and right. That is the best way I can express myself. I want to convey to you and to the jury just what I believe and think, and the only way I can do that is by using my own means of expression. I am willing to give you my opinion

altogether, every word of it. The legitimate way to declare war is by vote of Congress. I don't recognize the right of Congress to go above the will of the people in the Constitution that they adopted after a revolution. I judge the constitution for myself. I cannot act according to my judgment; if I thought somebody ought to be killed I cannot go and kill him. I have not done anything that I recognize as hindering or obstructing the law. I don't believe in
taking the Government in my own hands; I don't know
249 what that means when you ask me if I am an anarchist,
may be you know. I believe in the people ruling, every one of the people, whether it is a poor fellow or a rich fellow; that is what I advocate, that the people should have the power to declare war. I believe in unyielding opposition to all proposed legislation for military or industrial conscription. As stated in that Socialist Party literature which was adopted before the conscription act was passed. That was the attitude of the Socialist Party before the Conscription law was passed. The Socialist Party means by mass movement the right of petition. I don't interpret it to mean force; maybe you do; I don't believe in anarchism like you do. I don't believe in Anarchism. I had no intention to obstruct or interfere with the execution of the laws. I know that ignorance of the law excuses no one; that a man is bound to know the law and that what he is doing does not infringe the law. I contend we were just following out the rights the Constitution gives us, to work for the repeal of any law passed by Congress; we had the right of freedom of speech in press and in assembly; the right of conscience, because, when this government was founded it was founded on freedom of conscience; people ran away from Europe. I contend that I have kept within the law. It is up to you to prove that I have not. I don't know why we used the red color for that poster. I guess it attracts attention. My brother and I were on the Committee. I was on the committee that prepared the card distributed advertising the meeting which has been put in evidence. There were others on the committee. I am not sure whether I wrote it or not. I think I may have written some of it. I meant by the expression "Americans wake up, defend your liberty at home" just what it says. At that time there was a lot of talk suspending labor laws, the child labor legislation, of throwing down the immigration laws and allowing Chinese and Japanese to come into the country and there was a general movement to abolish the freedom of speech and press, and
to suppress people who differed with the opinions expressed
250 by those in power. There were numerous attempts to destroy
the constitutional liberties of the people. They may not have been all official attempts, but there were attempts made at propaganda in the newspapers to that effect, and by employers' associations, to repeal the legislation for child labor; I thought that on July 3rd, the eve of the declaration of American Liberties it was no more than right to propose to defend the liberties we had at home without going and fighting to extend them to Europe. I have been speaking about the child labor laws that have been passed in a number of states; they have tried to get them set aside as a war measure.

There were some women who were supposed to speak on that subject at the meeting. We mean by saying that men of conscription age would speak that there were some fellow- who were conscientious objectors who stated they would be willing to come and state the reasons for their conscientious objections, but they didn't do it. The Rev. Whitaker had a couple of fellows who were going to come up. They didn't come. I know that Clyde Crawbauer, one of Whitaker's boys down there, was willing to make a speech, but afterwards decided that he would not. All the speakers advertised did not speak. One of the objects stated in the articles of incorporation of the American Patriots was to test the constitutionality of all laws that interfere with the constitution. The people are the judges of the laws that are going to be tested. I never gave any consideration as to who was going to direct the American Patriots or what they should do to test the laws of Congress and the orders of the executive. I was not there at any meeting after the organization or when they discussed that point. I suppose all who are learned in the legal provisions would be able to judge what was to be done. It was not too big an undertaking for real, true American Patriots to challenge and test in the courts each and every act of the state department that violates the constitution. There were very
251 good articles in those articles of incorporation. I didn't give any thought on the point of whether any of these things would be carried out during the present war. I recognized that the powers that were in were in, and that the only way you could do anything was to go to the people and tell the people your sentiments and see that all that agreed with your sentiments got together and petitioned Congress for a redress of the grievances. I was not concerned with whether they would stop them immediately or later, but I believed that the people should have a right to vote whether they wanted to go to war or not. I believe that every official that disobeys the trust of the people should be subject to recall. I believe the people should have the right of referendum and the right of initiative. I believe that any law that is regarded as inimical to the best interests of the people, or any part of the people, that that part of the people have the right to test that law. I believe that those congressmen who disobey the will of the people should be recalled. I think the people are expressing themslves very well, now, because every congressman that is going back home is being defeated by the people opposed to him. I was willing to join this corporation for the purpose of testing the law. I was not concerned about the number of test cases. The first time I ever thought about it was when the United States Attorney brought it up in this case in this court. We wanted everybody as members who wanted to test the law. When I was in it the dues were only 25¢ a month. There was no method designed as to how or with whom we would test it. I thought that would be taken care of later. I heard no discussion while I was a member of a resolution to secure a bonding company to make bail for those arrested. I don't know anything about that. It all happened after I resigned. I didn't keep up with the doings of the American Patriots. The Peace Council is not an extension

of the American Patriots. The American Patriots have noth-
252 ing to do with the Peace Council. The Peace Council is open to anybody interested in peace. Mr. O'Connell was not selected as a representative of the Peace Council at Minneapolis. There was one selected by the general Council here of about three or four thousand members. I do not attend all the meetings of the Peace Council. I presume Mr. O'Connell is a member. I don't know. At the time I was securing bail, a woman had telephoned that she was coming over to give bail for me, and I asked the commissioner if he would not wait a few minutes so I could get out on bail; he said no; they ordered me to prison for the night; I felt that it was not right to be sent to prison when my bail could come over in a few minutes. Somebody made the accusation in there that I was evading it; I said I was not evading it, that I thought I had a right to get bail. When I went out of there he says: "You had better take him out of here." I said something; I don't know what I said. I didn't say that all the officials and the whole business could go to Hell and that if I knew they were going to put me in jail I would not be there. I possibly may have said if I knew they wouldn't give me a chance to get bail and wanted to put me in prison when I could have gotten bail, I would have waited until I got the lady and come up with her; I might have said something else at the time. I might have said Hell. Possibly I did. I was at the Peace Council when Daniel O'Connell was taken off the platform. I was sitting there as secretary when the marshal came in. I went about my business just as I did every other day. I was to speak in Oakland that Sunday night; I went over there and I was going to go in the Hall, and they told me that they didn't want me to speak because they didn't want the Socialists' Party mixed up in that, and they didn't want me to be arrested on the premises. So I went home; they didn't want to have any excitement created in the meeting. The Socialists conduct every Sunday night a propaganda meeting for their ideas and their principles and this was one of the
253 meetings. I have not been interested in any of the I. W. W. members. I have heard of some of the leaders. I don't know any of the leaders. I know some of the men. I am a Socialist, and if anybody knows the difference between an Anarchist and a Socialist they know that Anarchists and Socialists are just at the opposite poles. One is an indiv-*ud*-list and the other is a collectivist; one believes in the people ruling all collectively, and the other believes in them ruling individually. I don't know if I know one, two or ten I. W. W.'s. I do not attend their meetings. I might have been at one of their meetings just as at other meetings. I was up to the radical club once when a professor from the University of California was speaking. It was an open dinner. Anybody could go. It was called a radical club. I know Mr. and Mrs. Mooney and Miss Pearl Vogel. We have only four rooms in our house and no defense league or anything like that ever made headquarters at our house. I didn't put 50 Fulton St. as my address on the articles of incorporation. Somebody typed it in and it is a mistake. I didn't give that as my address. 52 Fell Street has been my address for the

last six years and it has never been a secret. I have not addressed the public for the last six weeks. On August 24th I made a speech in San Jose in behalf of the People's Council of America.

Redirect examination:

When I spoke of aid in the Dreamland Ring meeting on July 3rd, I spoke not only of financial aid, but every kind of aid that could be granted for the purpose of urging the legislation on Congress. At that time there was introduced a bill to give the conscientious objectors, exemption, and another bill was to put him in a non-combative service. It was to recognize in some way or other the right of a man to his own conscience. I appealed for help along that course. Since then they have announced that the conscientious objectors will be engaged in non-combative service. That was the only thing I appealed on behalf of the conscientious objectors. At this
254 point the circular of the People's Council of America was offered in evidence by the defendants and admitted and marked Defendants' Exhibit D and read to the jury (original exhibit to be transmitted to the Supreme Court pursuant to stipulation.) I did not distribute that literature. It was distributed through the office of the organization of which I am secretary. I never heard anybody say anything about the American Patriots at the meeting of July 3rd. I never thought of the organization until the night of July 12th. There was nothing said about any project to organize the American Patriots at the meeting of July 3rd.

Exception No. 14.

At this point the following questions were asked, answers and objections made, and rulings given.

Q. Did the Socialist Party get out a petition for the repeal of the conscription law?

Mr. Preston: To which we object as not redirect examination.
The Court: The objection is sustained; you have gone into that sufficiently — which ruling the defendants then and there duly excepted and designate it as Exception No. 14. The witness resumed his testimony as follows:

Before and after the meeting of July 3rd I actually circulated a petition for the repeal of the conscription law and secured signatures to it. It was since April, 1917. At the meeting held at Dreamland Rink the petitions were circulated and signed there. They were sent on through the agency of the Socialist Party locally here. They were turned over to them, and sent on to Congress. I based my judgment that the Draft Act was unconstitutional on a number of things; the main thing was the constitution itself. There is one amendment to the constitution known as the 13th amendment that was passed after the Civil war. I had authority on which I based it. I read Daniel Webster's speech. I read President

255 Wilson's message in 1916, when he was on a speaking campaign. I read Attorney-General Wickersham's opinion; I read Hannis Taylor's address to Congress; I read a number of the Senators' and congressmen's—their opinion on the constitutionality of the draft law at the time that it was proposed in Congress. I read a number of current articles in periodicals. I didn't circulate this Socialist platform at all. It was seized. I had nothing to do with it. I had authority for my statement that I considered was not seditious.

Exception No. 15.

At this point the following questions were asked, objections and rulings made and exceptions taken.

Q. Will you tell the jury what authority you had for concluding that this was not seditious?

Mr. Preston: I don't think he had any authority. You are trying to get him to say about the Maryland decision, and I thing that that Maryland decision was after this. I object to the question on the ground that he testified that he did not circulate any of these matters.

Mr. O'Connell: Counsel asked him if he agreed——

The Court: He need not have any authority for agreeing; it was his privilege to agree. The objection is sustained. It is wholiy immaterial here.

Mr. O'Connell: We save an exception.

The defendants then and there duly excepted to the ruling of the Court and designate it as Exception No. 15. The witness resumed his testimony as follows: The facts I want to bring out are that I never heard or saw the legal opinion until it was introduced in court here; that I have never seen or heard of the exemption claim except through the newspapers after they were filed, and I never heard it read complete until here in court. I had nothing to do with that wagon, -or did I see it, or with the slides, because I was out of the organization at the time and was not interested in it and 256 didn't know anything about it.

HERMAN B. SMITH was recalled and testified as follows: I want to make an explanation of the proposition that I had evaded arrest. I just thought the matter over and I was under $5,000.00 bail at the time and not evading any arrest at all. After the indictment it was raised to $10,000.00 and I just waited until I secured the other $5,000.00. That was the cause of the complication and delay referred to here by the District Attorney.

Cross-examination:

The first time I was arrested there was no trouble at all. I don't remember if I wanted any time. It was the second time that I waited three, four, or five days before I showed up. At this point the transcript of the stenographic report of the speech of the defendant

Daniel O'Connell, at Dreamland Rink August 21st, 1917, was produced and offered in evidence and it was admitted and marked Defendant's Exhibit D.

THOMAS CAREY one of the defendants was duly sworn and testified as follows: Direct examination by Mr. O'Connell. I reside at 741-9th st. and am the same Thomas Carey who signed the O'Connell claim for exemption put in evidence in this case. I left it with the board. I got this claim of exemption in Daniel O'Connell's office. I assisted in the preparation of it. I read it before it was finally finished, especially the last sentence of it which was put in at my suggestion. I wanted it put in the claim of exemption because I did not believe in going back and fighting for England. I would always fight for America. I first saw Daniel O'Connell July 25, 1917, in his office. Prior to that time I had joined the American Patriots on that day at its headquarters in the Mechanics Building. I went over there and joined them of my own volition and no person solicited me. After I joined them I went over to see Mr. O'Connell. Before I joined them I had determined to test the constitutionality
257 of the draft law. When I went over to Mr. O'Connell's office I told him I had joined the American Patriots and he said all right. I told him my name was Thomas Carey and he asked me what I was going to do. I said to him, I am going to test the constitutionality of the draft law. I intended to do that before I ever knew about the American Patriots and Mr. O'Connell said, that is all right. Mr. O'Connell then asked me if I had registered and I said yes. He then told me to go and take the physical examination and obey the law in every legal way and then we will test the constitutionality. That is the substance of our conversation. I next saw Mr. O'Connell after a meeting one night in the hall of the Pacific Building. At that meeting I heard him make a speech about testing the constitutionality of the law. He said that anybody that wanted to enlist and go to the war should go. At this point it was admitted that this witness would testify the same as the other witnesses about the speeches of Mr. O'Connell about the matter of the probable expense of taking a case to test the constitutionality of the law to the Supreme Court of the United States. The witness resumed his testimony as follows: I was afterwards at Mr. O'Connell's office with John Murphy who testified here. I met Mr. Murphy on the 3rd of August at McSweeney's saloon. I was there talking to Mr. Conway, when Murphy came in. We had a few drinks. Murphy was reading a card for his physical examination. After I looked at the card I said I had one myself. So we were talking. *On* one knew where the board met and I said I would like to go there and file a claim of exemption that Daniel O'Connell is getting ready for me. I told him I belonged to the American Patriots and he said he would like to belong to that himself and test the constitutionality of the law. That he didn't want to go back and fight for England but he was always ready to fight for America. I then said if you want to know where the office is it is 741 Mechanics Building.

258 Murphy said, ain't you going down there to day. I said yes, and he said I will meet you an hour from now and go down with you. We met afterwards and took a jitney down to the American Patriots where he joined and then we went over to Mr. O'Connell's office where I was going for the exemption claim and Mr. O'Connell said he would fix the two claims of exemption for Saturday as long as we were going on the same day and we could take the physical examination Monday. On Saturday we came after the two exemption claims and went out and filed them and made a date to meet at half-past seven Monday morning and go down together and take the physical examination. Monday morning it came out in the newspaper that we were going to be put in jail and I said I ain't going to take any chances on that. Murphy said I ain't either. We went down that day to Mr. O'Connell's office and told him what we had seen, and I suppose he had seen it before, and he said you did right; you will have plenty of time to go, and make another date some day and take the examination. I called twice at Mr. O'Connell's office for the claim of exemption before it was ready I think Murphy and myself were down to Mr. O'Connell's office one day after that Monday of August 6th, 1917. Mr. O'Connell suggested to Murphy that we have another date and go back and take the physical examination. Mr. Donlon was there the same day. I cannot remember what Murphy said in answer to the suggestion of Mr. O'Connell. The first time I ever saw the defendant- Herman B. Smith, David J. Smith and Carl Wacker was after the indictment and after we were arrested in this case at the time we had given bail before the Commissioner. The first time I saw Dr. Hoffman was August 3rd, the day I went to the headquarters with Mr. Murphy. Dr. Hoffman told Murphy what the objects of the organization were. I think he handed Murphy one of these circular letters put in evidence and told him about it. I never had any communication directly or indirectly with either of the three defendants Dr.
259 Hoffman, and the two Smith boys prior to the time that we came up to the Commissioners to give bail and were technically arrested. I never had any conversation with any of them at any time on the subject of obstructing the draft or obstructing the enlistment or evading the draft.

Cross-examination.

By Mr. Preston:

I took the physical examination last Thursday, September 20th. The first time I was notified to appear was on Monday, August 6th and about two weeks after I got a letter to appear and then got a week's extention. I didn't do anything about the notice to appear on August 6th until about a week ago. In the meantime I was under indictment. The reason I didn't go on the 7th of August was that I was waiting for the court to protect me when I did go down there. I was al-ready to take the examination. I took no steps to have the court protect me. On the 6th of August when we did go down to Mr. O'Connell's office he said it was just as well we didn't go as I

could get another date fixed to go. After that I was expecting to be tried every day. For that four weeks I didn't communicate by myself or by my attorney or by anybody else with the board. I have been condemned as physically unfit by the board. I first learned of the American Patriots at a meeting in Dreamland Rink in July where I saw a card. I don't know who announced the meeting of the American Patriots. I saw the card as I was coming out. The cards were distributed. There was something on it about the American Patriots. It gave the office number of the headquarters the day afterwards. I didn't see any wagons or banners going up and down the streets at that time. After that time I saw them advertising the meeting up in Dreamland Rink. That is all on the wagons I saw. I didn't see the motion pictures or the legal opinion. All the members of the American Patriots that I know of are these defendants. I have seen Henry Christman, the witness from Lodi. I never got acquainted with him. I thought the law was unconstitutional myself. I could read the constitution but I didn't read or see it. I heard great speakers who put in my head to test the constitutionality of the law. I heard Senator Works. I intended to test it in the court and that is what I am doing now. I intended to refuse to answer the call when I could be notified to appear. I didn't want to obstruct the law. I thought it was unconstitutional and I was going to test it by getting arrested and be tried, in court. I would rather go to jail than go over and fight for John Bull. I think that it is John Bull that is ruling this country. I think this country is absolutely under the thumb of John Bull. I don't know anything about it being corrupt. I think he is running it all right. He has run it all to smash. I thought that this was a free country and that is how I came to this country. The English are running it. The English capitalist is responsible for most of it, I mean. I have been a citizen three years. When I was admitted to citizenship I took an oath to uphold the constitution of the United States and to fight for this country and swore to uphold the laws of this country. I think this law is unconstitutional and I am testing it. I want to know about it. I know that this is what we call a representative form of government and have a Congress and a Senate that passes all the laws and that they are presumed to be valid until they are declared otherwise and that it is the duty of every naturalized citizen who has taken an oath to uphold the law to uphold them. I was going down to the board on the 6th of August before this came out in the newspapers.

At this point the following questions were asked, answers given and statements made by court and counsel.

Exception No. 14.

Mr. Preston:

Q. Why did you slander the country by putting in these things here?

(Pointing to the last sentence in the O'Connell claim of Exemption.)

Mr. O'Connell: We do not admit that he slandered the country.

261 Mr. Preston: I saw it is slander and I have a right to characterize it as slander.

The Court: I will have to tell the jury it is unnecessary to any claim of legal right.

Mr. O'Connell: We shall except to your Honor's remark.

The Court: I shall have to instruct the jury that that language is outside any legal right.

Mr. O'Connell: We ask for an exception to your Honor's remark.

The defendants then and there excepted to the said remarks and ruling of the Court and designate it Exception No. 14. The witness resumed his testimony as follows:

The reason I put the last statement in the last paragraph of the O'Connell claim of exemption was I had no use for England. I think that all the troubles are England's troubles. I don't want to see the United States in the war at all. She is already in by the legal method but that is the trouble. Why did she go in? She recognized that the Germans had started a war against us and it was so declared by Congress. I want to see the United States get out of it by stopping the war. I want to stop the war. I think the draft law is unconstitutional and I don't want any war. I don't care who goes to war. Anybody that wants to go can go; I never stopped anybody. I don't want to fight for England. England got this country into the war. I recognize that the legally constituted authorities of our country are the ones to settle the question of war. I believe in the system of government that requires us to elect officers by vote and then those officers perform their duties under the law. I think it was unconstitutional for Congress to pass this law. I didn't solicit John Murphy to join the American Patriots. This organization was organized just to test the constitution. I guess every man was going to test it just as I was. They were going to put a test case

262 through. While it was being tested I suppose I would have to get out a writ of habeas corpus and get out on bail or go to jail. If it was constitutional I was ready to go to war. Everybody has his own rights I did not obstruct any law.

Redirect examination:

I based my belief and had in mind a statement of President Wilson, I took it out of the "Examiner." I have not a very good memory but I know I took it down. I read the "Examiner" at that time it was published. Yes I went down and found it out. That was in my mind at the time.

The Court: Read nothing until it has been admitted in evidence.

A. That is only just a little of it (handling).

Mr. Preston:

Q. Where did you get this statement?

A. That is from the Examiner.
Q. What date?
A. It is on there. (October 18, 1913.)
Q. When did you make this copy?
A. I made that yesterday.
Q. You made it yesterday? I thought you said you had it in mind at the time?
A. I had it in mind.
Q. Who referred you to this yesterday?
A. I read all of the papers.

The Court: Mr. Preston, it is wholly immaterial here.

Mr. O'Connell:

Q. Did you copy this from the "Examiner" yourself?
A. Yes.
Q. Is this the statement you referred to when you told the jury that you based your opinion on what you had read in the "Examiner"?
A. Yes.
Q. About some official declaration?
A. Yes.
Q. This is it?
A. Yes.

Mr. O'Connell: If your Honor please, I offer this in evidence.

The paper offered containing the quotation from the San Francisco Examiner of October 18, 1913, reads as follows. U. S.
263 Ambassador Page in delivering a speech at the unveiling of an obelisk in the esplanade at Southampton, England said: "In spite of the great fusion of races and of the great contributions which other nations have made to the hundred millions of people across the sea, and to her incalculable wealth, the United States is yet English led and English ruled."

The Court: It will not be admitted. It is wholly immaterial and incompetent.
Mr. O'Connell: Your Honor will save us an exception?
The Court: Yes.

To which said ruling and exclusion of evidence the defendants then and there duly excepted and designate it as Exception No. —.

The witness resumed his testimony as follows: On the Monday, August 8th, when we went to see Mr. O'Connell I told him why we had not gone up to take the examination at 8:00 o'clock that morning and Mr. O'Connell said: "You were right, they would have arrested you if you went up there." It was in the afternoon that we called at Mr. O'Connell's office. There was no picture on the circular that I received at the meeting in Dreamland Rink. I think it is one of these circulars put in evidence here without the picture at the top. I paid my money when I joined the Patriots to Mr.

Serbin. The first time I met Wacker was the other day in the Postoffice.

Exception No. 15.

WAL J. TUSKA was duly sworn and testified as follows:

Redirect examination.

By Mr. O'Connell:

I am an attorney at law practicing in California for 35 years and have had practice in the Supreme Court of the United States as well as all courts of California. I remember about two months ago talking with the defendant Daniel O'Connell about the constitutionality of the draft act.

Q. Will you tell the court and jury as quick as you can
264 what the conversation was?

Mr. Preston: To which we object as immaterial, irrelevant and incompetent.

The Court: The objection is sustained. It is wholly incompetent.

Mr. O'Connell: Your Honor will save me an exception.

To which ruling defendants then and there excepted and designated it as Exception No. 15.

Exception No. 16.

Q. Did you have a talk with Mr. O'Connell about taking proceedings to test the constitutionality of the draft act.

Mr. Preston: To which we object on the ground that what he said about it would not amount to anything.

The Court: The objection is sustained.

To which ruling the defendants then and there duly excepted and designated it as Exception No. 16.

Exception No. 17.

Q. Did you have any talk with Mr. O'Connell about you being retained to assist Mr. O'Connell, as senior counsel or otherwise, in preparing a test case for the Supreme Court of the United States on the constitutionality of this draft act?

Mr. Preston: To which we object—If the court wants to admit that, if he was consulted about this case I do not really object to that.

The Court: The objection is sustained.

To which ruling the defendants then and there duly excepted and designate it as Exception No. 17.

Exception No. 18.

Q. Did you ever talk with Mr. O'Connell about the expenses of taking the case to the Supreme Court of the United States and how the money to meet the expense was to be raised?

Mr. Preston: To which we will urge the same objection.
265 The Court: The same ruling.

To which ruling the defendants then and there duly excepted and designated it as Exhibit No. 18.

Exception No. 19.

Q. Did Mr. O'Connell have any talk with you about organizing a corporation for the purpose of raising the money to meet the expenses of carrying the test case to the Supreme Court of the United States?

Mr. Preston: To which we make the objection it is immaterial, irrelevant and incompetent, a self-serving declaration, not germane to any issue in this case in any shape or manner.

The Court: I do not think, upon the theory upon which the case has been tried that is strictly so. Their claim is that this corporation was organized with the honest and innocent purpose that they stated, to secure funds for the testing out of this law and her purposes.

Mr. Preston: You can answer that, Mr. Tuska.

Mr. O'Connell:

Q. Go on, Mr. Tuska. Do you understand the question?
A. I understand the question. About two months ago.
Q. Just answer whether you had such a talk with me?
A. I did.
Q. Tell the jury what it was.

Mr. Preston: Objected as immaterial.
The Court: The objection is sustained.

To which ruling the defendants then and there duly excepted and now designate it as Exception No. 19.

Exception No. 20.

Q. Tell the jury what Mr. O'Connell said on that subject?

Mr. Preston: Objected to as already ruled upon.
The Court: The objection is sustained.

To which ruling the defendants then and there duly excepted and now designate it as Exception No. 20.

Exception No. 21.

266 Q. Did Mr. O'Connell tell you that he was organizing a corporation for the purpose of raising funds to pay you a retainer for preparing and presenting this case testing the constitutionality of the draft act.

Mr. Preston: To which we make the same objection and ask that the court direct him that he has covered the point.

The Court: No, he is entitled to ask the question, so long as he does not trench upon the ruling of the court. The objection is sustained. It is wholly incompetent.

Mr. O'Connell: This goes to the good faith that has been talked about.

The Court: Not to the lawyer.

To which ruling as aforesaid the defendants then and there duly excepted and now designate it Exception No. 21.

Exception No. 22.

Mr. O'Connell:

Q. Did you afterwards inquire from Mr. O'Connell how far he had got with the corporation in raising the money to pay the expenses of testing the constitutionality of this draft act in the Supreme Court of the United States?

Mr. Preston: I object to that.

The Court: The objection is sustained, Mr. O'Connell, and I will now instruct you not to ask anything further along that line.

To which ruling and instruction the defendants then and there duly excepted and designate it as Exception No. 22.

Exception No. 23.

At this point the defendants offered in evidence the decision of Judge Rose of the United States District Court of Maryland, and his charge to the jury, which was referred to by the Smith Boys and the other witnesses as having been read by them.

Mr. Preston: It is immaterial, irrelevant and incompetent. It was not published until July 11th and I do not think it came out until a good many days after the American Patriots had been
267 organized.

Mr. O'Connell: It was wired all over the country on July 11th.

Mr. Preston: Furthermore, it does not appear what was before Court at that time.

The Court: Is this an official publication?

Mr. O'Connell: This is a congressional publication.

The Court: There is no authenticity, is there, to this matter put in

the Congressional Record? The decisions of the Court must be in some regular authenticated book. The objection is sustained.

To which ruling the defendants then and there duly excepted and designate it as Exception No. 23.

Exception No. 24.

At this point the defendants offered in evidence the opinion of Attorney-General Wickersham on the constitutionality of sending the military out of the country.

Mr. Preston: We object to that on the ground it is immaterial. It is simply the Attorney-General's opinion. The Court will take judicial notice of it anyway.

The Court: What record is it in?

Mr. O'Connell: The Congressional Record.

The Court: The objections will be sustained.

To which ruling the defendants then and there duly excepted and designate it as Exception No. 24.

Exception No. 25.

At this point the defendants offered in evidence the Pope's appeal to the president of the United States and the United States' Government's reply to the Pope's appeal to make peace.

The Court: It will not be permitted to go into the record as evidence.

To which ruling the defendant- then and there duly excepted and designate it as Exception No. 25.

268 At this point the following offer was made.

Exception No. 26.

Mr. O'Connell: Now, if your Honor please, some of the witnesses and defendants referred to the fact that they had seen in the debates of the Congress that some of the senators claimed this law was unconstitutional. I offer the records of congress showing that debate and the claim that the law was unconstitutional.

Mr. Preston: To which we object on the ground it is not evidence in any form in the world.

The Court: You mean the debates in congress?

Mr. O'Connell: Yes.

The Court: What is the purpose you offer these for?

Mr. O'Connell: To show what these witnesses say they justified their opinion upon about the constitutionality of the law. They said it was unconstitutional.

The Court: In the first place, the opinions of others are no justification for an act that is claimed to be illegal; in the next place, so

far as their bearing here is concerned, these remarks have no bearing upon the question that we are dealing with. They are wholly incompetent for the consideration of this jury. To which ruling the defendants then and there duly excepted and designate it as Exception No. 26.

Exception No. 27.

Mr. O'Connell: Now, if your Honor please, some of the witnesses stated that they had read the argument of Daniel Webster, December 9, 1814 in congress, on the constitutionality of conscription for foreign service. I offer it in evidence.

The Court: I am familiar with that.

Mr. Preston: To which we object——

Mr. O'Connell: I offer in evidence that speech of Daniel Webster of December 9, 1864, on the constitutionality of the draft law.

269 Mr. Preston: I object to that on the ground that it is not an authenticated report of Webster's speech, and upon the further ground it is immaterial, irrelevant and incompetent.

The Court: The objection that it is incompetent and irrelevant is sustained.

To which ruling the defendants then and there duly excepted and now designate it as Exception No. 27.

Mr. O'Connell: There were two documents marked for identification. One was the opinion of Attorney-General Wickersham and the other was the speech *of* congress on the constitutionality of the law—I think the witnesses identified them both as papers they had read and on which they based their opinions as to the unconstitutionality.

The Court: I just ruled out the Wickersham opinion.

Mr. O'Connell: That was in the congressional record. I thought possibly your Honor had sustained that objection on the ground of authenticity.

The Court: No. It is wholly immaterial.

Mr. O'Connell: I offer these papers as identified.

The Court: They will be excluded.

Exception No. 28.

Mr. O'Connell: I offer in evidence, if your Honor please, the speech of the president to Congress dated January 22, 1917, called the "Peace without victory" speech.

Mr. Preston: It is not necessary to offer that. We object to it as being incompetent, immaterial and irrelevant.

The Court: The objection is sustained.

To which ruling the defendants then and there duly excepted and designate it as Exception No. 28.

Exception No. 29.

ERNEST R. HOFFMAN was then recalled for the prosecution, and testified as follows:

Direct examination.

By Mr. Preston:

270 I know that Henry Christman is a member of the American Patriots. I do not know whether he has been notified to appear to answer for military service. I don't know whether the corporation has taken any steps to defend the matter against the call to military service. We have not had a meeting within the last few days at which this question was discussed.

Here the defendants and the government rested. The foregoing being all the evidence offered or introduced by either party upon trial of said cause.

Which said motion was denied by the Court, to which ruling of the Court defendants then and there duly excepted and designate it as Exception No. 29.

The foregoing is all of the charge excepted to and all which the defendants are allowed by the Rules of the Supreme Court of the United States to insert in this bill of exceptions. But the defendants are ready, willing, and hereby offer to insert the entire charge if permitted to do so. And thereupon the jury retired at 5.27 P. M. to deliberate about its verdict, and subsequently at 6.35 P. M. returned into Court and rendered a verdict:

"We the jurors find the defendants (naming them all) guilty on the — Count, — on the — count.

THOMAS H. HASKINS,
Foreman."

Thereupon the defendants moved the Court to arrest judgment upon the said verdict for the following reasons:

1. The indictment, and each count thereof, does not set forth facts sufficient to constitute an offense against the United States.

2. The first count of said indictment is repugnant to itself for the particular reasons set forth in the demurrer of the defendants, filed in this action and hereby referred to and made a part of this motion.

3. The second count of said indictment is based on Section
271 6 of the Selective Service or Draft Act approved May 18, 1917, which applies only to persons engaged in carrying out the terms of said Act and it is not alleged that any of the defendants were officials or in any way engaged in the carrying out of said Act.

4. The said first count does not inform the defendants of the nature of the charge against them in that in the first part it alleges a conspiracy to obstruct recruiting and enlistment and another part

it alleges a conspiracy to induce and persuade, or the inducing and persuading not to do certain things which cannot be obstructing.

5. The said indictment is based upon the Espionage Act approved June 15, 1917 and the Selective Service or Draft Act approved May 18, 1917 and the Rules and Regulations prescribed by the President of the United States in pursuance thereof approved May 18, 1917, and each and all of said acts are unconstitutional and in violation of the various sections of the Constitution of the United States specified in the demurrer of the defendants heretofore filed in this cause and hereby referred to and made a part of this motion to save encumbering of the record with its repetition, because of which said errors in the record herein no lawful judgment can be rendered by the Court upon the record in this cause.

Exception No. 30.

And thereupon the defendants moved the Court for a new trial of said cause based upon the minutes of the Court and for the following reasons:

1. The Court erred in overruling defendants' demurrer to the indictment and each count thereof.

2. The Court erred in overruling defendants' motion to quash the indictment and each count thereof.

3. The verdict is contrary to the law of the case.

272 4. The verdict is not supported by any evidence in the case.

5. The Court upon the trial of the case admitted incompetent evidence offered by the United States.

6. The Court upon the trial of the case excluded competent evidence offered by the defendants.

7. The Court improperly instructed the jury to the prejudice of the defendants.

8. The Court improperly refused, to defendants' prejudice, to give correct instructions tendered by the defendants.

9. The Court erred in refusing to direct a verdict of not guilty at the close of the government evidence.

10. The Court erred in refusing to direct a verdict of not guilty at the close of all the evidence.

11. The abuse of any discretion which the presiding Judge may have had by which the defendants were prevented from having a fair trial, that is charging of the jury with respect to matters of fact and the meaning force and sufficiency of the whole evidence and of certain portions thereof selected and particularly emphasized by the presiding judge as sufficient to authorize and require a verdict of guilty against the defendants.

12. That said verdict is against the law.

13. Insufficiency of the evidence to justify the verdict in the following among other particulars: *a.* The evidence was insufficient to prove any of the conspiracies charged in either court of the indictment. *b.* The evidence was insufficient to show any overt act to effect the object of any of the alleged conspiracies or any act done in pursuance of any previous, or other, conspiracy. *c.* The evidence

was insufficient to prove any intended, or other offense, against the United States, or that any act was done, or attempted to be done or agreed to be done to the injury of the service of the United States;

d. The evidence was insufficient to show any evasion, or aid-
273 ing, advising, consulting and abetting an evasion, or refusal to obey any requirements of the said act or any other act or law. *e.* The evidence was insufficient to show any making of any false statement or certificate as to liability of any person as alleged in the second count of said indictment or the causing of the same to be made. *f.* The evidence was insufficient to sustain any of the allegations of the acts, declarations, agreements or conspiracies of the defendants as alleged in the first or second count of said indictment. *g.* The evidence was insufficient to sustain any of the allegations of the first or second count of the indictment.

14. Errors in law, occur-ing at the trial, and excepted by the defendants, and which appears more particularly in the minutes of the court and will be more fully stated in said bill of exceptions to be hereafter prepared, served and filed.

And thereupon the Court rendered its judgment and sentence upon said verdict, which judgment and sentence is hereby referred to and made a part of this bill of exceptions.

The foregoing bill of exceptions contains all the material evidence and proceedings in said action.

DANIEL O'CONNELL,
Attorney for Defendant O'Connell.
T. C. WEST,
WALTER McGOVERN,
Attorney- for Defendants Wacker, Carey & Hoffman.
C. A. LINN,
Attorney for Defendants Smith & Smith.

The foregoing engrossed bill of exceptions having been duly served and lodged in conformity with the order of this Court made July 24, 1918 and approved by the U. S. Attorney, the same is hereby allowed and signed this — day of Sept. A. D. 1918.

____ ____,
Judge of Said U. S. District Court.

274 *Certificate to Bill of Exceptions.*

I hereby certify that the judgment in the above-entitled cause was rendered on September 29th, 1917; that upon the rendition of said judgment, the defendants were on said date granted thirty days' time within which to prepare and propose a bill of exceptions therein;

That thereafter, on October 23rd, 1917, the Judge of the Court granted an order that the time within which said bill of exceptions should be prepared and served should be extended to the next ensuing term of this Court, to wit, November 15th, 1917;

That thereafter, on November 12th, 1917, the said Judge granted a further order extending the time for proposing such bill of exceptions to November 27th, 1917;

That thereafter, on November 26th, 1917, the said Judge granted a further extension of time for the proposing of said bill of exceptions to and including the 15th day of December, 1917;

That thereafter, on December 14th, 1917, said Judge granted a further extension for the proposing of said bill of exceptions to and including December 24th, 1917;

That thereafter, on December 24th, 1917, said Judge granted a further order extending the time for preparing said bill of exceptions up to and including the 31st day of December, 1917;

That several of these orders recite upon their face that they were "granted in open court," but the fact is that each and all of said orders, excepting the first, were chambers orders granted by the Judge and bear no evidence of service upon the United States Attorney;

That during said period, Rule 9 of this Court provided:

275 "For the purpose of making and filing bills of exceptions and of making any and all motions necessary to be made within the term at which any judgment or decree is entered, each term of this Court shall be and hereby is extended so as to comprise a period of three calendar months beginning on the first Tuesday of the month in which verdict is rendered or judgment or decree entered."

That during said period, Rule 61 of said Court provided:

"When an act to be done in any action, suit or proceeding which may at any time be pending in this Court, relates to the pleadings in the cause, or the undertakings or bonds to be filed, or the justification of sureties, or the preparation of bills of exceptions, or of amendments thereto, or to the giving of notices of motion, the time allowed by these rules may, unless otherwise specially provided, be extended by the Court or Judge by order made before the expiration of such time but no such extension or extensions shall exceed thirty days in all, without the consent of the adverse party; nor shall any such extension be granted if time to do the act or take the proceeding has previously been extended for thirty days by stipulation of the adverse party; and any extension by previous stipulation or order shall be deducted from the thirty days provided for by this rule. It shall be the duty of every party, attorney, or other person applying to the Court or Judge for an extension of time under this rule, to disclose the existence of any and all extensions to do such act or take such proceeding which have previously been obtained from the adverse party or granted by the Court or Judge;

276 and any extension obtained from the Court or Judge in contravention of this rule shall be absolutely null and void, and may be disregarded by the adverse party. Nothing herein contained shall interfere with the power of the Court to extend the time to do an act or take a proceeding in any cause until after some event shall have happened or some step in the cause shall have been taken by the adverse party."

That after the expiration of the three months' period provided for in Rule 9 of this Court, defendants' counsel, in open Court and in the presence of the United States Attorney, asked for a further

extension of time within which to prepare and propose a bill of exceptions herein, and thereupon the United States Attorney announced that he would not consent to such extension but that he should move at the proper time and ask the Court to refuse to settle any bill if one should be proposed;

That subsequently, on December 31st, 1917, a proposed bill of exceptions was presented and lodged with the Clerk, and thereafter the United States Attorney, on January 9th, 1918, procured from the Judge of this Court an order granting the United States to and including the 30th day of January, 1918, within which to propose amendments to said proposed bill of exceptions;

That thereafter, and in due time within such extension, the United States Attorney, without expressly reserving his objection that said bill came too late, proceeded to and did propose amendments to said bill;

That thereafter, on March 28th, 1918, defendants procured from the Judge of this Court an order fixing the 1st day of April, 1918, as the date for hearing and settling the proposed bill and amendments thereto;

That thereafter, on April 1st, 1918, the United States Attorney served upon the defendants and filed in said Court the following notice and motion attached thereto:

277 "(Title of Court and Cause.)

Notice of Motion.

To Daniel O'Connell, E. R. Hoffman, Carl J. E. Wacher, Thomas Carey, David J. Smith and Herman B. Smith, and to T. C. West, Walter McGovern, and C. A. Linn, attorneys for said named defendants:

You will please take notice that the plaintiff in the above entitled matter, through its attorney, John W. Preston, United States Attorney for the Northern District of California, will, on Monday the 8th day of April 1918, at 10 o'clock A. M. of said day, at the court room of Division number one of the above-entitled court in the Post office Building at San Francisco, move the said court to strike from the files of the said court defendants' proposed bill of exceptions, and to refuse to settle and sign the said proposed bill of exceptions upon the grounds set forth in the motion attached hereto, and made a part hereof.

That said motion will be based upon all the papers and records on file in the said matter.

JOHN W. PRESTON,
United States Attorney."

"(Title of Court and Cause.)

Motion to Strike Out Proposed Bill of Exceptions.

Now comes John W. Preston, United States Attorney for the Northern District of California, attorney for the United States in the above entitled matter, objects to the settlement and signing of defendants' proposed bill of exceptions on writ of error to the Supreme Court of the United States in the said case, and moves this Honorable Court to strike from the files the said proposed bill of exceptions on the following grounds, to wit:

I.

That the said proposed bill of exceptions does not conform to Rule 101, page 51 of the Rules of Practice of the United States
278 District Court for the Northern District of California, in that the lines thereof are not numbered in the margin, as provided by said rule.

II.

That the term within which the judgment in the above entitled case was entered, has long since expired and the three months' extension of said term provided for by Rule 9, page 6 of the Rules of the United States District Court for the Northern District of California has also expired, and that the extension of the time within which to have settled and signed, and to file the bill of exceptions in said case granted by the court within the said term and the extension thereof, has also expired and that no extension of time within which to have the said bill of exceptions settled, signed or filed, has been given by plaintiff and that the time within which said defendants may have the said bill of exceptions signed, settled and filed has long since expired, and that this court is without power to settle and sign or allow said bill of exceptions;

That this motion is made and based upon the papers and records on file in the said case which show that judgment was rendered therein on the 29th day of September, 1917; that the extension of the term, provided for by rule 9 above mentioned, to wit, three calendar months from the first Tuesday in September, 1917, expired December 4th, 1917; that the last order extending time made by this court within the said term and the extension thereof, was dated November 26th 1917, and extended the time within which to serve and file defendants' proposed bill of exceptions in said case to December 14, 1917; that the said court thereafter, to wit, on the 14th day of December 1917, made an order extending time to 'prepare, serve and file' defendants' bill of exceptions to December 24th, and on December 24th 1917, made a similar order
279 extending said time to December 31st 1917, but that the court was without power to make either of said orders; and

that no extension of time to file said defendants' bill of exceptions was made or attempted to be made after the said order of December 24th 1917, and the plaintiff has never by stipulation granted an extension of time to defendants or any of them, within which to file their said bill of exceptions.

JOHN W. PRESTON,
United States Attorney;
ANNETTE ABBOTT ADAMS,
Assistant U. S. Attorney,
Attorneys for Plaintiff."

That thereafter, on April 5th, 1918, the defendant served on the United States Attorney and filed in said Court an answer to the foregoing motion to strike out, which is in words and figures as follows:

"(Title of Court and Cause.)

Defendants' Answer to Motion to Strike Out Proposed Bill of Exceptions.

Now come the defendants in the above entitled action and for answer to the motion of plaintiff to strike out defendants' proposed bill of exceptions, a copy of which motion and notice was served on the defendants, April 1, 1918, the defendants allege as follows:

I.

Answering paragraph I of said motion, the defendants allege that the new rules of the United States District Court went into effect on November 1, 1916, and they were unaware of the provisions of Rule 101 that the lines of the bill of exceptions should be numbered, and if they had known it they would have caused them to be num-
280 bered before they were served, but in the hurry of preparing said bill of exceptions and from other work, it never occurred to any of the attorneys for the defendants that the lines of said bill of exceptions were not numbered, or that there was a rule of court requiring them to be numbered. Many days after the service of said proposed bill of exceptions on the plaintiff and after they had been lodged and filed with the Clerk of said District Court, the Assistant United States Attorney, Mrs. Annette A. Adams, called the attention of C. A. Linn, Esq., attorney for some of the defendants, to the fact that the said lines were not numbered, and said C. A. Linn immediately answered that defendants would correct the mistake and number said lines, but Mrs. Adams replied that plaintiff had concluded not to be finicky about the matter and had concluded to waive the failure to number said lines; and relying thereon, the defendants did not therefore number said lines of said bill of exceptions. But the said defendants have been and are now ready and willing and hereby offer to have the lines of said proposed bill of exceptions numbered in accordance with said rule. No objection whatever was made to said proposed bill on the ground that said lines were not numbered until

the afternoon of April 1, 1918, when the said United States District Attorney served on one of the attorneys for some of the defendants a copy of said notice of motion and motion to strike said proposed bill of exceptions from the files. In the meantime, on January 9, 1918, said plaintiff procured from said District Court an order extending the time within which plaintiff might file proposed amendments to said proposed bill of exceptions to and including January 31, 1918, which order said defendants filed in said action on January 10, 1918; on January 30, 1918, said plaintiff served upon the defendants and lodged and filed with the Clerk of said District Court proposed amendments to said proposed bill of exceptions, in none of
281 which was any objection raised or made to the failure to have said lines numbered. The defendants allege that the conduct of said plaintiff as herein set forth was a waiver of the failure to have said lines numbered and a consent that they might remain unnumbered and said plaintiff is now estopped from raising or making the said objection that the lines of said proposed bill of exceptions were not numbered. Said defendants further allege that the provisions of Section 1591 of the Compiled Statutes of the United States apply to said failure to number said lines of said bill of exceptions and that said objections of the plaintiffs should be overruled.

II.

Defendant answering Paragraph II of plaintiff's said motion allege as follows:

1. On September 29, 1917, immediately after judgment in said action, the said District Court in open Court and in the presence of the United States Attorney and his first assistant, the defendants moved for thirty (30) days' time within which to prepare, serve and file, a proposed bill of exceptions, which motion was then and there granted, said United States Attorney and first assistant attorney not objecting but consenting, which time would not expire until October 29, 1917.

2. October 23, 1917, said Court in open Court 'for good cause shown' said time was extended 'to the next term of this Court, to wit: November 15, 1917.' Said order was signed and filed October 23, 1917.

3. In open Court on November 12, 1917, said Court 'for good cause appearing' extended said time to and including November 27, 1917, which order was signed and filed November 12, 1917.

4. In open Court on November 26, 1917 'good cause appearing therefor' said Court extended said time to and including De-
282 cember 15, 1917, which order was signed and filed November 26, 1917.

5. In open Court on December 14, 1917, 'good cause appearing therefor' said Court extended said time to and including December 24, 1917, which order was signed and filed on said December 14, 1917.

6. December 24, 1917, in open Court 'upon application of defendants and good cause appearing therefor' and supported by affidavit of

C. A. Linn, said Court extended said time to and including December 31, 1917, which order was signed and filed December 24, 1917.

7. On December 31, 1917, said proposed bill of exceptions were served upon the plaintiff and said United States Attorney in his office and by leaving with the clerk in charge in the usual manner, and on the same day lodged and filed with the Clerk of said District Court in the office of said District Court, and it was the duty of the clerk to deliver the same to the said United States District Judge which duty was performed.

8. The said plaintiff through the United States Attorney had notice of, and knew of, all said applications, and copies of each of said orders were left with the clerk in charge of said United States Attorney's office on each of the said days on which they were made, and most of said applications were made in the presence of said United States Attorney and with his knowledge and no objection whatever was made at any time on behalf of the plaintiff, and therefore with the consent of plaintiff they were made and granted.

9. The terms of said District Court are fixed by Section — of the Judicial Code of the United States, being also Section — of the Compiled Statutes of the United States, and the terms of said Court commence the first Monday in July, the first Monday in November
283 and the first Monday in March, and the extension of October 23, 1917 to the next term of said Court, to wit: November 14, 1917, was a sufficient extension of the time from term to term.

10. The plaintiff on March 28, 1918, was notified that defendants were to apply to said District Court at 2 P. M. on said March 28, 1918, for an order fixing a time and place for settling and signing said bill of exceptions and said notice was served by leaving a copy of the proposed order with the Clerk in charge of the said United States Attorney's office before said 2 o'clock P. M. on said day, and also thereafter by the Secretary of the United States District Court, Judge Van Fleet, delivering to Assistant United States Attorney, Mrs. Annette A. Adams, the original unsigned order setting a time and place for allowing, settling and signing said bill of exceptions and by an oral declaration by Daniel O'Connell, one of the defendants, in open Court to said Mrs. Adams that he was going to make said motion on the coming in of the Court, and a few minutes thereafter, in the presence of Mrs. Adams and John W. Preston, Esq., United States Attorney, said Daniel O'Connell made said motion in open Court on said March 28, 1918, at 2 o'clock P. M., and no objection thereto was made by anyone on the part of the plaintiff. Thereafter on said March 28, 1918, said District Court granted said motion and made, signed and filed the order setting Monday, April 1, 1918, at 2 o'clock P. M. as the time for hearing parties and settling and signing said Bill of exceptions and none of the objections set forth in said motion to strike said proposed bill of exceptions from the file was made at that time, or at any time until said afternoon of April 1, 1918, and defendants allege that the said conduct of the said plaintiff and the United States Attorney and the Assistant United States Attorney as herein set forth was a waiver of all irregularities, if any, in the granting of any extension of time for serving and filing said

284 proposed bill of exceptions and was a waiver of any and all objections now set forth in said motion and notice of motion and was a consent to said extension of time, and the plaintiff is now estopped from raising or making any of said objections at this time. The principal questions involved in said action are the construction and application of the first amendment to the Constitution of the United States in reference to an Act of Congress and other constitutional questions of great importance, and the interests of justice require that said objections of the plaintiff be overruled.

11. The defendants further allege that the plaintiff having made no move and take no action in said case prior to the serving, lodging and filing of said proposed bill of exceptions and prior to the making and filing of the order setting said bill of exceptions down for hearing, settling and signing, said District Court had ample jurisdiction under its Rule 101 to make any and all said extensions and that said District Court would take judicial notice of its own records and therefore had knowledge of all things that had been done prior thereto and all presumptions are in favor of said jurisdiction to make said extension and that its orders and action cannot be attacked in this collateral proceeding and motion. And said Section 1591 of the Compiled Statutes of the United States apply to the present motion of the plaintiff, and said motion should be denied.

III.

The defendants further answering said motion and the allegations therein allege that said Rule 101 provides that said plaintiff may serve upon the defendants within ten days after the defendants served said proposed bill of exceptions upon the plaintiff any 285 proposed amendment of the plaintiff to said bill, which time expired January 10, 1918, as the proposed bill had been served upon the plaintiff and lodged and filed with the Clerk of the District Court on December 31, 1917. The said plaintiff did not serve its proposed amendments on any of the defendants or any of the attorneys for the defendants until January 30, 1918, and such service was null and void and said amendments cannot be considered or allowed by the District Court because said plaintiff had not complied with said rule 101 and secured an order from said Court or any Judge of said Court extending the time within which plaintiff might serve upon defendants said proposed amendments. Plaintiff did procure from said Court without notice to the defendants an order extending the time within which plaintiff might file proposed amendments to said bill which order was filed January 10, 1918, but said order was never served at any time upon the defendants or any of the defendants' attorneys. The plaintiff is therefore not in a position to make any objection whatever to the settling, or allowing, or signing of said bill of exceptions, or to make any motion to strike said bill from the files as the defendants have the right to have said bill settled, allowed, signed and filed without any amendments of the plaintiff thereto. All the proceedings in said action were taken be-

fore the same Judge who made all orders therein and had full knowledge of all previous proceedings when he made the various orders granting said extension of time and was fully informed as to how and when said extensions were procured and of the sufficiency of the cause and the soundness of the legal grounds and jurisdiction therefor.

IV.

These defendants further answering allege that on March 28, 1918, said District Court duly issued a writ of error in said action returnable to the Supreme Court of the United States at Washington,
286 D. C., in sixty days and on the same March 28, 1918, duly issued a citation to the plaintiff now defendant in error, returnable at the same time and place as said writ of error, all of which appears of record and copies of which were on March 28, 1918, duly served upon said plaintiff at the said office of the said United States Attorney by leaving said copies with the clerk in charge of said office, and these defendants allege as a further answer to said motion that said District Court has no jurisdiction, power or authority to grant said motion to strike said proposed bill of exceptions from the files of said District Court, or to refuse to settle, allow and sign a bill of exceptions in said action.

Wherefore the defendants pray that for each and all the foregoing grounds and others to be made at the hearing of said motion, that said motion be denied.

DANIEL O'CONNELL,
Attorney for Daniel O'Connell.
C. A. LINN,
Attorney for Herman B. and David J. Smith.
T. C. WEST,
WALTER McGOVERN,
Attorneys for E. R. Hoffman, Thomas Carey, and Carl J. F. Wacker."

That after the hearing of said Motion but before the determination thereof, there was filed herein the affidavits of T. C. West, Daniel O'Connell, and Annette Abbott Adams, Assistant United States Attorney, copies of which are as follows, and which said affidavits were considered by the Court in passing upon said motion:

"(Title of Court and Cause.)

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

T. C. West, being duly sworn deposes and says as follows: I am one of the attorneys for the defendants Carey, Hoffman and Wacker in the above entitled cause; that I have read the 'Defendants' answer

to motion to strike out proposed bill of exceptions,' and know
287 the contents thereof; that said answer was prepared after careful investigation and I thoroughly believe that the same and all the statements contained therein are true; that I personally know that on November 12, 1917, the court, 'good cause appearing therefor,' extended the time referred to in said answer to and including November 27, 1917, which order was signed and filed November 12, 1917; that again on November 25, 1917, said court further extended said time to and including December 15, 1917, and on December 14, 1917, the said time was further extended by said court up to and including December 24, 1917; I am informed and believe that on December 24, 1917, said time was further extended up to and including December 31, 1917; that on December 31, 1917, the defendants' proposed bill of exceptions was duly served upon the United States District Attorney and lodged with the clerk of this court; that upon said last mentioned date this affiant prepared an order further extending the time for the signing and settlement of said bill of exceptions and requested the judge of this court to extend the time so as to give sufficient time for the attorney for the plaintiff to file his proposed amendments to said bill of exceptions, but the judge of this court informed this affiant that he thought a further extension of time was unnecessary insomuch as the defendants had served their bill of exceptions and it would be time enough to fix the time of assigning such bill of exceptions when the District Attorney had filed his proposed amendments and the same were settled.

That on or about the 10th day of January, 1918, an order was made by this court granting to the plaintiff up to and including the 30th day of January, 1918, within which to file its proposed amendments to defendants' proposed bill of exceptions, a copy of which order was mailed to this affiant on or about said 10th day of
288 January, 1918, and received by this affiant in due course of mail.

T. C. WEST.

Subscribed and sworn to before me this 29th day of April, 1918.

FRANCIS J. KRULL,
U. S. Commissioner."

"(Title of Court and Cause.)

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Daniel O'Connell, being duly sworn, deposes and says as follows: I am one of the defendants in the above entitled action; I prepared the 'Defendants' Answer to Motion to Strike Out Proposed Bill of Exceptions,' and know the contents thereof, and filed the same in said action; that said answer was prepared after careful investigation and I have every reason to believe, and do believe that all the statements contained therein are true, and I personally know that certain parts of said answer are true, to-wit, the following: subdivisions 1, 2,

7, 8, 10 and 11 of paragraph II, and the allegations in paragraphs III and IV of said answer, so far as the allegations of facts are therein stated. Affiant further deposes and says that on December 31st, 1917, he discussed with Thomas C. West, Esq., Attorney for some of the other defendants, the necessity of securing from the United States District Judge, William C. Van Fleet, an order extending and fixing the time for settling and signing the Bill of Exceptions in said action, and that said Thomas C. West prepared and showed to affiant an order which he had prepared for that purpose to be signed by said Judge and left my office for that express purpose, and later returned and reported to me that he had presented the said order to said Judge Van Fleet and that said Judge Van Fleet answered that it was unnecessary until after the plaintiff had presented its
289 amendments, and then the order could be made fixing the date if there was no stipulation and that said Thomas C. West and the defendants had thus far done all that they could do. I never heard any objection from the plaintiff; and the plaintiff by its attorneys or otherwise never made any objection to me to any of the steps in the proceeding or any of the proceedings in the preparation, serving or filing the proposed Bill of Exceptions, until April the first, 1918, when they served upon me the said notice of motion to dismiss. Now before submission of the said motion for decision I herewith submit this affidavit together with the points and authorities.

DANIEL O'CONNELL, *Defendant.*

Subscribed and sworn to this 29th day of April, 1918.
HENRY B. LISTER,
Notary Public in and for the City and County of San Francisco, State of California."

"(Title of Court and Cause.)

CITY AND COUNTY OF SAN FRANCISCO,
State and Northern District of California, ss:

Now comes Annette Abbott Adams and having been first duly sworn, deposes and says: That she is an Assistant United States Attorney in and for the Northern District of California and as such was one of the attorneys for plaintiff in the above entitled case and is familiar with all the proceedings therein, and replying to the defendants' so-called 'Answer to Motion to Strike Out Proposed Bill of Exceptions' and the affidavits of T. C. West and Daniel O'Connell, alleges as follows: that a copy of the said 'Answer to Motion
290 to Strike Out Proposed Bill of Exceptions' was left at the office of the United States Attorney at San Francisco some time prior to April 29, 1918, the date upon which the plaintiff's motion to strike out defendants' proposed bill of exceptions was heard by the Court; that said so-called Answer to — Strike Out Proposed Bill of Exceptions was not and never has been verified; that on or about April 30, 1918 and after plaintiff's motion to strike

out defendants' answer to proposed bill of exceptions had been heard by and submitted to the Court, T. C. West, Attorney for defendants Carey, Wacker and Hoffman left with affiant a copy of an affidavit subscribed to on April 29, 1918, a copy of which appears among the papers in the case, but which bears no evidence of having been regularly filed with the Clerk of the above entitled Court; that on June 23, 1918, affiant also found among other papers in said case on file in the office of the Clerk of the above entitled Court, an affidavit of defendant Daniel O'Connell, which said affidavit bears no evidence of ever having been regularly filed with the Clerk of the said Court, or of having been served upon the United States Attorney's office and which has not been theretofore seen by or brought to the attention of affiant or any other attorney for plaintiff; that in the said affidavits the said T. C. West and Daniel O'Connell state that they believe the allegations of defendants' Answer to Motion to Strike Out Proposed Bill of Exceptions to be true, and the said Daniel O'Connell alleges in his said affidavit that he knows the allegations of fact in subdivisions 1, 2, 7, 8, 10 and 11 of Paragraph II, and the allegations of fact in Paragraphs III and IV are true of his own knowledge.

In answer to the said allegations this affidant alleges that at no time did plaintiff in the said action, either by the United
291 States Attorney or any of his assistants, grant to defendants or any of them, either by stipulation or otherwise, any extension of time within which to prepare, serve or file a proposed bill of exceptions; that on the contrary, they at all times refused to grant any such extensions, and repeatedly so told counsel for defendants; that none of the papers filed in the said case since the entry of judgment show any admissions of service by counsel for plaintiff; that the United States Attorney and affiant were in Court on September 29, 1917, when the Court granted to defendants thirty days within which to prepare, serve and file a proposed bill of exceptions, but neither the said United States Attorney or affiant consented thereto; that thereafter none of the orders extending defendants' time within which to prepare, serve, or file their proposed bill of exceptions was made in the presence of, or with the knowledge of, or with the consent of the United States Attorney or his assistants, or any of them, except that on one occasion, the exact date of which is not known to affiant, defendant Daniel O'Connell, in the presence of the United States Attorney and this affiant, asked in open Court for an extension of time in which to prepare, serve, and file a proposed bill of exceptions in the said case, whereupon the United States Attorney, on being asked by the Court whether he would consent to the requested extension of time refused his consent thereto, stating specifically that he thought defendants' time to file their proposed bill of exceptions had expired and that he did not desire to waive any rights of the plaintiff in the premises; therefore affiant alleges that all of the orders of the Court extending the time of defendants in which to file their proposed bill of exceptions were made without the consent of plaintiff and that with the two exceptions above mentioned, plaintiff's counsel had no knowledge of the orders of the Court extend-
292 ing defendants' time to prepare, serve and file a proposed bill of exceptions until after said orders were made, and therefore

affiant respectfully submits that all of said orders extending defendants' time to prepare, serve and file a proposed bill of exceptions, except the first one made on September 29, 1917, are null and void, and that counsel for the plaintiff are entitled to disregard them under the provisions of rule 61 of the Rules of Practice for the United States District Court for the Northern District of California, which provides:

'When an act to be done in any action, suit or proceeding which may at any time be pending in this Court, relates to the pleadings in the cause, * * * or the preparation of bills of exceptions, * * * the time allowed by these rules may, unless otherwise specially provided, be extended by the Court or Judge by order made before the expiration of such time; but no such extension or extensions shall exceed thirty days in all, without the consent of the adverse party; nor shall any such extension be granted if time to do the act or take the proceeding has previously been extended for thirty days by stipulation of the adverse party; and any extension by previous stipulation or order shall be deducted from the thirty days provided for by this rule. It shall be the duty of every party, attorney, or other person applying to the Court or Judge for an extension of time under this rule, to disclose the existence of any and all extensions to do such act or take such proceeding which have previously been obtained from the adverse party or granted by the Court or Judge; and any extension obtained from the Court or Judge in contravention of this rule shall be absolutely null and void, and may be disregarded by the adverse party.'

ANNETTE ABBOTT ADAMS,
Assistant United States Attorney.

293 Subscribed and sworn to before me this 28th day of June 1918.

T. L. BALDWIN,
Deputy Clerk U. S. District Court,
Northern District of California."

That on May 1st, 1918, the Judge of this Court, at the request of the attorney for the defendants, made the following order herein:

"(Title of Court and Cause.)

Order Extending Time.

For good cause shown on the application of the defendants in the above entitled action, it is hereby ordered that the time for hearing, settling and signing the Bill of Exceptions of the defendants in the above entitled action is hereby extended to June 1st, 1918, and

It is further ordered that the time within which said cause may be docketed in the Supreme Court of the United States on the appeal on the writ of error issued in this action March 28, 1918, is hereby extended until after the settling, allowing and signing of the Bill of Exceptions of defendants in said action.

Done in open Court this 1st day of May, 1918.

WM. C. VAN FLEET,
United States District Judge.

The above order is granted without prejudice to the pending motion of the United States to strike the defendants' proposed bill of exceptions from the files as proposed too late.

WM. C. VAN FLEET, *Judge.*"

That thereafter, on July 22nd, 1918, the Court rendered its oral opinion on said motion to strike said bill of exceptions from the files, a copy of which opinion is as follows:

294 "(Title of Court and Cause.)

The Court (Orally): This is a motion by the United States Attorney, for the Government, that the Court refuse to settle the defendants' proposed bill of exceptions and to strike it from the files, on the ground that it is presented too late.

I have examined the matter carefully and with considerable pains, and in view of the facts I am quite satisfied that the proposed bill comes too late, unless the objection has been waived by the course taken by the United States Attorney's office. The several orders giving defendants time, while purporting on their face to have been made in open court, were in fact, except as to the first, but Chambers orders and there is no evidence of service upon the United States Attorney of any of those orders, while it appears affirmatively from the affidavit of the Assistant United States Attorney that they never were served and that they had no knowledge in the United States Attorney's office of time being granted, with the exception that on one occasion in open court when the defendant O'Connell, in his own behalf and that of his co-defendants, requested an extension of time for proposing a bill of exceptions, consent thereto was refused by the United States Attorney, who was present, and the statement distinctly made by the latter that the time had gone by and that he would take advantage of a motion to have the court refuse to settle any bill, if one should be proposed. This would bring the objection within rule 61 of this court.

But thereafter, when the bill was finally proposed, the United States Attorney, without any specific renewal or reservation of the objection theretofore suggested, proposed amendments to the proposed bill; and the contention is now made by the defendants that that was a waiver of the objection. I am very strongly of the view
295 that, owing to the attitude of the United States Attorney, distinctly stated theretofore, which was all that could be done under the circumstances, this was not such a waiver. But the situation strikes me thus: The case is one of importance and should be speedily determined. Should I hold the bill too late and in accordance with that view strike it out and refuse to settle it, and the reviewing court should perchance to take a different view of the effect

of the acts of the United States Attorney, it would result that, there being no bill of exceptions before them, the cause would have to rest until the lower court should be required to settle a bill of exceptions. Now I do not think that that is the better method. I have determined to pursue this course: I will settle the bill subject to the objection; I will recite the facts in my certificate settling it, that is, the facts which I have stated as to the time granted and the other facts I have suggested, and thereupon the objection can be renewed in the appellate court. That court has held repeatedly, notwithstanding a bill has been settled by the lower court, that if so settled when too late it is beyond the jurisdiction of the court—that is, the court has lost jurisdiction to settle the bill—and they will not regard it although the settled bill is found in the record; and that will be all that the United States Attorney can ask in such case if his position is correct. On the other hand, should the higher court take the view that the action of the United States Attorney was a waiver of the objection and the bill is properly settled, then they will have a record before them to enable a disposition of the case upon its merits; which would greatly facilitate ending the controversy. In that view the motion to refuse to settle the bill and to strike it from the files will at this time be formally denied, without prejudice to its renewal in the higher court."

That thereafter, in pursuance of the facts above recited, in-
296 cluding those stated in the foregoing opinion, the Court proceeded to settle the said proposed bill, without prejudice to the right of the United States to renew its objections to said bill in the Supreme Court;

And now at this time, the said bill of exceptions having been engrossed in accordance with the directions of the Court, the same is now allowed as correct; and it is now ordered and directed that the said cause be docketed in the Supreme Court of the United States on the Writ of Error issued herein on or before the 1st day of the October Term thereof, 1918.

Signed and certified this 16th day of September, 1918.

WM. C. VAN FLEET,
United States District Judge.

Endorsed: Filed Sep. 16, 1918. W. B. Maling, Clerk, by C. M. Taylor, Deputy Clerk.

297 In the United States District Court for the Southern Division of the Northern District of California.

Div. No. 1.

No. 6220.

THE UNITED STATES

vs.

DANIEL O'CONNELL et als.

Motion for New Trial and Notice.

And now come the defendants in the above entitled cause, by Daniel O'Connell, their Attorney, and moves the Court to set aside the verdict rendered herein and to grant a new trial and for reasons therefore shows to the Court the following:

1. The Court erred in overruling defendants' demurrer to the indictment and each count thereof.
2. The Court erred in overruling defendants' motion to quash the indictment and each count thereof.
3. The verdict is contrary to the law of the case.
4. The verdict is not supported by any evidence in the case.
5. The court upon the trial of the case admitted incompetent evidence offered by the United States.
6. The Court upon the trial of the case excluded competent evidence offered by the defendant.
7. The Court improperly instructed the jury to the prejudice of the defendants.
8. The Court improperly refused, to defendants' prejudice, to give correct instructions tendered by the defendant.
9. The Court erred in refusing to direct a verdict of not guilty at the close of the government's evidence.
10. The Court erred in refusing to direct a verdict of not guilty at the close of all the evidence.
11. The abuse of any discretion which the presiding Judge may have had by which the plaintiffs were prevented from having
298 a fair trial, that is charging of the jury with respect to matters of fact and the meaning force and sufficiency of the whole evidence and of certain portions thereof selected and particularly emphasized by the presiding judge as sufficient to authorize and require a verdict of guilty against the defendants.
12. That said verdict is against law.
13. Insufficiency of the evidence to justify the verdict in the following among other particulars: *a.* The evidence was insufficient to prove any of the conspiracies charged in either court of the indictment, *b.* the evidence was insufficient to show any overt act to effect the object of any of the alleged conspiracies, or any act done in pursuance of any previous, or other, conspiracy, *c.* the evidence was in-

sufficient to prove any intended, or other offence, against the United States, or that any act was done, or attempted to be done or agreed to be done to the injury of the service of the United States; *d.* the evidence was insufficient to show any evasion, or attempt at evasion, or aiding, advising, consulting and abetting an evasion, or refusal to obey any requirements of the said act or any other act or law; *e.* the evidence was insufficient to show any making of any false statement or certificate as to liability of any person as alleged in the second count of said indictment or the causing of the same to be made; *f.* the evidence was insufficient to sustain any of the allegations of the acts, declarations, agreements or conspiracies of the defendants as alleged in first or second count of said indictment; *g.* the evidence was insufficient to sustain any of the allegations of the first or second counts of the indictment.

14. Errors in law, occurring at the trial, and excepted to by the defendants, and which appear more particularly in the minutes of the court and will be more fully stated in said bill of exceptions to be hereafter prepared served and filed.

299 The said motion will be based and made upon the minutes of the Court.

The United States Attorney is hereby notified that the foregoing motion will be made and presented to said District Court September 29, 1917 at 10 A. M. or as soon thereafter as the Court will hear it.

HERMAN B. SMITH,
DAVID JAY SMITH,
Defendants, for Themselves.

(Endorsed:) Filed Sep. 29, 1917. W. B. Maling, Clerk, by C. W. Calbreath, Deputy Clerk.

300 In the District Court of the United States for the Southern Division of the Northern District of California.

Div. No. 1.

No. 6220.

THE UNITED STATES

vs.

DANIEL O'CONNELL et al.

Motion in Arrest of Judgment.

And now after verdict against the said defendants and before sentence, come the said defendants in their own proper persons and by Daniel O'Connell their Attorney and move the court here to arrest judgment herein and not pronounce the same, for the following reasons to-wit:

1. The indictment, and each count thereof, does not set forth facts sufficient to constitute an offense against the United States.

2. The first count of said indictment is repugnant to itself for the particular reasons set forth in the demurrer of the defendants, filed in this action and hereby referred to and made a part of this motion.

3. The second count of said indictment is based on section 6 of the Selective Service or Draft Act approved May 18, 1917 which applies only to persons engaged in carrying out the terms of said Act and it is not alleged that any of the defendants were officials or in any way engaged in the carrying out of said Act.

4. The said first count does not inform the defendants of the nature of the charge against them in that in the first part it alleges a conspiracy to obstruct recruiting and enlistment and another part — it alleges a conspiracy to induce and persuade, or the inducing and persuading not to do certain things which cannot be obstructing.

5. The said indictment is based upon the Espionage Act approved June 15, 1917 and the Selective Service or Draft Act approved
301 May 18, 1917 and the Rules and Regulations prescribed by the President of the United States in pursuance thereof approved May 18, 1917 and each and all of said acts are unconstitutional and in violation of the various sections of the Constitution of the United States specified in the demurrer of the defendants heretofore filed in this cause and hereby referred to and made a part of this motion to save encumbering of the record with its repetition, because of which said errors in the record herein no lawful judgment can be rendered by the Court upon the record in this cause.

DANIEL O'CONNELL,
Attorney for Themselves.

DAVID JAY SMITH,
HERMAN B. SMITH,
Themselves.

(Endorsed:) Filed Sep. 29, 1917. W. B. Maling, Clerk, by C. W. Calbreath, Deputy Clerk.

302 At a Stated Term of the District Court of the United States for the Northern District of California, First Division, Held at the Court-room thereof, in the City and County of San Francisco, State of California, on Saturday, the Twenty-Ninth Day of September, in the Year of Our Lord One Thousand, Nine Hundred and Seventeen.

Present: The Honorable, William C. Fleet, District Judge.

No. 6220.

UNITED STATES OF AMERICA

vs.

DANIEL O'CONNELL et al.

(Sentence—Order Denying Motion for New Trial—Order Denying Motion in Arrest of Judgment.)

This case came on regularly this day for the pronouncing of Judgment upon the defendants Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacher, Thomas Carey and E. R. Hoffman, for the offense of which they stand convicted herein. Said defendants were present in open Court in their own proper person and with counsel. John W. Preston, Esq., United States Attorney for the Northern District of California, was present for and on behalf of the United States.

Defendants made a motion in arrest of judgment and a motion for a new trial. After hearing counsel for respective parties, the Court ordered that said motions be, and the same are hereby denied.

Said defendants were then called for judgment and no cause appearing why judgment should not be pronounced upon said defendants, the Court ordered that defendant Daniel O'Connell, for the offense of which he stands convicted, be imprisoned in the United States Penitentiary at McNeil Island, Washington, for the
303 period of five (5) years on the first count of the Indictment and for the period of two (2) years on the second count of the Indictment, said terms of imprisonment to run consecutively; that defendant E. R. Hoffman, for the offense of which he stands convicted, be imprisoned in the United States Penitentiary at McNeil Island, Washington, for the period of two (2) years on the second count of the Indictment and for the period of three (3) years on the first count of the Indictment, said terms of imprisonment to run concurrently; that defendant Thomas Carey, for the offense of which he stands convicted, be imprisoned in the United States Penitentiary at McNeil Island, Washington, for the period of two (2) years on the first count of the Indictment and for the period of two (2) years on the second count of the Indictment, said terms of imprisonment to run concurrently; that defendant Carl J. F. Wacher, for the offense of which he stands convicted, be imprisoned in the United States Penitentiary at McNeil Island, Washington, for the period of eighteen (18) months on the first count of the Indictment and for the period of eighteen (18) months on the second count of the Indictment, said terms of imprisonment to run concurrently, and that he pay a fine in the sum of Two Hundred Fifty (250) Dollars and that in default of the payment thereof he be further imprisoned until said fine be paid or until he be otherwise discharged by due course of law; and that defendants David J. Smith and Herman B. Smith, for the offense of which they stand convicted,

each be imprisoned in the County Jail of the County of San Francisco, State of California, for the period of one (1) year on each count of the Indictment, said terms of imprisonment to run concurrently as to each of the said defendants David J. Smith and Herman B. Smith.

304 Further ordered that pending the determination of the appeal herein, that the bonds for the release of said defendants be, and the same are hereby fixed as follows: Bond of Daniel O'Connell, $25,000.00; Bond of E. R. Hoffman, $15,000.00; Bond of Carl J. F. Wacher, $10,000.00; Bond of Thomas Carey, $10,000.00; and Bonds of defendants Herman B. Smith and David J. Smith, $5,000.00, each. Further ordered that said defendants in default of bail, as heretofore ordered, stand committed to the custody of the United States Marshal for the Northern District of California, for their appearance herein and that Mittimus issue.

Further ordered, on motion of Mr. O'Connell, that defendants have thirty days within which to serve and file their proposed Bill of Exceptions.

305 In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 6220.

THE UNITED STATES OF AMERICA

vs.

DANIEL O'CONNELL, DAVID J. SMITH, HERMAN B. SMITH, CARL J. F. WACHER, Thomas Carey, and E. R. Hoffman.

Convicted of a Conspiracy to Violate the Act of Congress of May 18, 1917, and Act of Congress of June 15, 1917.

Judgment on Verdict of Guilty.

Now on this 29th day of September, A. D. 1917, the defendants, in their own proper persons, being present in open Court, come- John W. Preston, United States Attorney and move- the Court that Judgment be pronounced in this cause; whereupon the defendants were duly informed by the Court of the nature of the indictment filed on the 7th day of September, A. D. 1917, charging them with a conspiracy to violate the act of Congress of May 18, 1917, and the Act of Congress of June 15, 1917; of their arraignment and pleas of Not Guilty; of their trial and the verdict of the Jury on the 25th day of September, A. D. 1917, to-wit:

"We the Jury, find Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacher, Thomas Carey, and E. R. Hoffman, the defendants at the bar, Guilty.

THOMAS H. HASKINS, *Foreman.*"

The defendants were then asked if they had any legal cause to show why judgment should not be pronounced against them, and no sufficient cause being shown or appearing to the Court, and the Court having denied a Motion for a New Trial and a Motion in Arrest of Judgment; thereupon the Court rendered its Judgment;

306 That, whereas, the said Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacher, Thomas Carey and E. R. Hoffman, having been duly convicted in this Court of a conspiracy to violate the act of Congress of May 18, 1917, and the act of Congress of June 15, 1917;

It is therefore ordered and adjudged that the said Daniel O'Connell be imprisoned in the United States Penitentiary at McNeil Island, State of Washington, for the period of five (5) years on the first count of the Indictment and for the period of two (2) years on the second count of the Indictment; said terms of imprisonment to run consecutively; that the defendant E. R. Hoffman be imprisoned in the United States Penitentiary at McNeil Island, State of Washington, for the period of two (2) years on the second count of the Indictment and for the period of three (3) years on the first count of the Indictment; said terms of imprisonment to run concurrently; that the defendant Thomas Carey be imprisoned in the United States Penitentiary at McNeil Island, State of Washington, for the period of two (2) years on the first count of the Indictment and for the period of two (2) years on the second count of the Indictment; said terms of imprisonment to run concurrently; that the defendant Carl J. F. Wacher be imprisoned in the United States Penitentiary at McNeil Island, State of Washington, for the period of eighteen (18) months on the first count of the Indictment and for the period of eighteen (18) months on the second count of the Indictment; said terms of imprisonment to run concurrently; and that he pay a fine in the sum of Two Hundred fifty ($250.00) Dollars, and in default of the payment of said fine that he be further imprisoned

307 until said fine be paid or until he be otherwise discharged in due course of law; that the defendants David J. Smith and Herman B. Smith, each, be imprisoned in the County Jail, City and County of San Francisco, State of California, for the period of One (1) year on each count of the Indictment; said terms of imprisonment to run currently as to each of said defendants David J. Smith and Herman B. Smith.

Judgment entered this 29th day of September, A. D. 1917.

WALTER B. MALING, *Clerk*,

By C. W. CALBREATH, *Deputy Clerk*.

(Endorsed:) Entered in Vol. 7 Judg. and Decrees at Page 258.

308 In the United States District Court for the Southern Division of the Northern District of California.

Div. No. 1.

No. 6220.

THE UNITED STATES

vs.

DANIEL O'CONNELL et als.

Petition for Writ of Error.

Daniel O'Connell, E. R. Hoffman, Carl J. Wacker, Thomas Carey, Herman B. Smith and David J. Smith defendants come personally in Court and by their Attorney Daniel O'Connell feeling themselves aggrieved by the verdict of the jury and the judgment entered September 29, 1917, and petition the above entitled Court for an order, allowing them the said defendants to prosecute a writ of error to the Honorable Supreme Court of the United States under and according to the laws of the United States in that behalf provided and that in the meantime and until the final determination by the Supreme Court of the United States and the receipt of its mandate that they be admitted to bail and the bail bonds thus furnished act as supersedeas bonds, and your petitioner will ever pray.

DANIEL O'CONNELL,
Attorney for all Defendants.

(Endorsed:) Filed Sep. 29, 1917. W. B. Maling, Clerk, by T. L. Baldwin, Deputy Clerk.

309 In the District Court of the United States for the Southern Division of the Northern District of California.

Div. No. 1.

No. 6220.

THE UNITED STATES

vs.

DANIEL O'CONNELL et als.

Assignments of Error.

Daniel O'Connell, Carl J. Wacher, Thomas Carey, Herman B. Smith, David J. Smith, and E. R. Hoffman, defendants in the above entitled cause, and now plaintiff in error, and in connection with

their petition for a writ of error in this cause assign the following errors which plaintiffs in error aver occurred at the trial thereof, and upon which they rely to reverse the judgment entered herein as appears of record.

I.

That the trial court erred in overruling the demurrer to the indictment and each count thereof, in this, to-wit:

1. The first count of said indictment is repugnant to itself in that it alleges a conspiracy to obstruct recruiting and enlistment by inducing and persuading and not by threats, force, or violence, and Congress never intended that said crime should be committed by inducing or persuading or applied to members of a family who should induce and persuade other members of the family not to enlist or be recruited, but intended that the words obstruct or obstructing should mean and apply only to cases where the obstruction was by threats, force or violence, or resistance.

2. The second count of said indictment is based on Section 6 of the Selective Service Act or Draft Act Approved May 18, 1917, which section applies only to persons who as officials or otherwise were employed or engaged in carrying out, or executing the provisions of the said Draft Act, and not to strangers who might or might not be subject to be called, and there are no allegations
310 in the said indictment that any of the defendants were officials or otherwise engaged in carrying out or executing the provisions of said Draft Act.

3. "Inducing and persuading" can only be accomplished by way of speech, or writing, or peaceable assembly, and to make either or all of them a crime would be abridging the freedom of speech, freedom of the press, and the right to peaceably assemble, discuss, criticize and pray for redress of grievances and thus accomplish that indirectly which the Constitution of the United States in its first amendment prohibits Congress doing directly.

4. The State of California has full power to legislate upon the subject of free speech, freedom of the press and peaceable assembly and in its Constitution provides that "every citizen may freely speak, write and publish his sentiments on all subjects" and that "the people shall have the right to freely assemble together to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances," and therefore any construction of said Act to cover or include the inducing and persuading alleged in the indictment or either count of said indictment, would be without any authority of the law and a violation of the Constitution of the United States and the State of California.

5. The Espionage Act approved June 15, 1917, and the Selective Service or Draft Act approved May 18, 1917, and the rules and regulations approved by the President of the United States in pursuance thereof and approved May 18, 1917 are each and all without authority of law and unconstitutional and violate the Constitution of the United States in the following among other particulars.

A. The Selective Service Law or Draft act of May 16, 1917, referred to in the indictment was and is, unconstitutional and void in that the Constitution does not give any power or authority to pass it, and it was not and is not now, for the purposes, or object,
311 of the common defense of the United States, but for the object and purposes of offence, and aggression as shown by the messages of the President and members of the Cabinet and Congress and for the purpose of changing the form and substance of the Government of Germany and the German Empire, and to assist England and other nations of Europe called the "Allies," in their internal affairs as shown by the Official Daily Bulletin of which the Court will take judicial notice.

B. The said rules and regulations were made, and are, without authority of law, and in violation of the Constitution of the United States, and especially in that they were made through a delegation of legislative power to the executive department which the Congress did not have power to delegate; and they are special, unfair, unequal and discriminating and arbitrary, and deprive citizens of the equal protection of the Constitution and laws of the United States and are the unwarranted exercise of legislative power on the part of the executive department of the United States.

C. The said Act approved May 18th, 1917, and rules and regulations, violates Article I of the Constitution and particularly Subdivision 15 of Section 8 thereof, which confines the purposes for which the militia may be called to the following:

a. To execute the laws of the Union.
b. Suppress insurrection.
c. Repel invasion.

and Subdivision 16 of Section 8, Article I, which specifically reserves to the states the control of the militia.

D. It violates Article I of the Constitution and particularly Section 1 and Subdivision 1 of Section 8 of the said Article in that it assumes to delegate the powers specifically reserved to Congress, to-wit: Legislative powers and the power to raise and support armies, to the President of the United States.

E. It violates Section I of Article XIII of the Amend-
312 ments to the Constitution which prohibits involuntary servitude except as a punishment for crime, whereof the party shall have been duly convicted.

F. It violates the first Amendment to the Constitution prohibiting Congress from making any law respecting an establishment of religion in that it assumes to recognize a certain religion and to discriminate in favor of the adherents of such religion.

G. It violates the fifth Amendment to the Constitution in that it subjects citizens to deprivation of life, liberty or property without due process of law in that it assumes to confer upon the President of the United States discretionary and arbitrary powers in the selection of citizens for drafting into the army.

J. It violates section IV of Article IV of the Constitution which

guarantees to every State of the Union a republican form of government. By the terms of the Act of May 18, 1917, citizens of the various States may be kept in the army in foreign service during "the period of emergency," which may be forever, subject to military law and possibly under the command of a foreign non-republican government. If two million citizens can thus be drafted and kept under martial law, ten million can be drafted, and the entire male population may be kept in the army indefinitely, thus substitution military autocracy for the republican form of government.

I. The Article also violates the following provisions of said Constitution:

Sub-divisions 11, 12, 14 and 17 of Section 8 of Article I.

Section- 1 and 2 of Article III.

Second paragraph of Article VI.

Amendments IV, VI, IX and X.

J. The said Act was to remain in force only during the emergency then existing but which has ceased to exist prior to the filing of this indictment and has never existed since Aug. 1st, 1917,
313 and does not exist and said Act ceased to have any force after August 1st, 1917.

K. The first sentence of the Constitution commonly called the preamble, stating the objects and purposes of the powers granted wherein, as violated in the war was not declared and is not conducted for the common defence of the United States, but for purposes not necessary to the common defence.

6. The *trail count* erred in refusing to direct a verdict of not guilty at the close of the evidence for the government in this to-wit: because there was no evidence whatever of any of the conspiracies charged in any of the counts of the indictments, or any act done to effect any of said conspirators or in pursuance of any of said conspirators.

7. The trial count erred in refusing to squash the indictment at the close of the evidence for the government, in this, to-wit: for the same reasons set forth in the previous assignment of error.

8. The trial count erred in refusing to direct a verdict of not guilty at the close of all the evidence, in this, to-wit: there was no evidence whatever, of any of the conspiracies charged in any way of the counts of the indictment and there was no evidence whatever of any act done to effect the object or objects of such conspiracies or in pursuance thereof.

Wherefore plaintiff in error prays that said judgment be reversed, and such other orders be made as law requires.

DANIEL O'CONNELL,
Attorney for Plaintiffs in Error.

(Endorsed:) Filed Sep. 29, 1917. W. B. Maling, Clerk, by T. L. Baldwin, Deputy Clerk.

314 In the United States District Court for the Southern Division of the Northern District of California.

Div. No. 1.

No. 6220.

THE UNITED STATES

vs.

DANIEL O'CONNELL et als.

Order Allowing Writ of Error.

This the 29th day of September, A. D. 1917, came the defendants by their Attorney, and filed herein and presented to the Court their petition praying for the allowance of a writ of error intended to be urged by him, praying also that a transcript of the records and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the Court does allow the writ of error upon the defendants giving bond according to law in the sum of $15,000 *thousand dollars*, by the defendant Hoffman, $10,000 each for defendants Wacher & Carey $5,000 for Defts. D. J. and Herman B. Smith and $25,000 *thousand dollars* by the defendant O'Connell, which bonds shall operate as supersedeas bonds.

WM. C. VAN FLEET,
United States District Judge.

(Endorsed:) Filed Sep. 29, 1917. W. B. Maling, Clerk, by C. W. Calbreath, Deputy Clerk.

315 In the District Court of the United States in and for the Southern Division of the Northern District of California.

No. 6220.

UNITED STATES OF AMERICA

vs.

DANIEL O'CONNELL et al.

Stipulation and Order Transmitting Certain Exhibits to the Supreme Court of the United States and Making the Same a Part of the Bill of Exceptions Without Incorporation at Large Therein.

It Is Hereby Stipulated and Agreed by and between the respective parties hereto that all United States' Exhibits and all Defend-

ants' Exhibits, save and except those incorporated at large in Defendants' Bill of Exceptions filed on December 31st, 1917, introduced in evidence upon the trial of the above-entitled cause may be transmitted in the original by the Clerk of the above-entitled Court to the Supreme Court of the United States, and that said Exhibits may be included as deemed a part of the Bill of Exceptions upon the Writ of Error herein, with the same effect in all respects as though incorporated at large in said Bill of Exceptions. This stipulation is given without prejudice to the Motion of the U. S. District Attorney, to strike out the Proposed Bill of Exceptions of the Defendants, made on the 15th day of April, 1918.

Dated October 2, 1918.

ANNETTE ABBOTT ADAMS,
United States District Attorney.
DANIEL O'CONNELL,
For the Defendant O'Connell.
T. C. WEST,
WALTER McGOVERN,
Attorney- for the Defendants Hoffman, Wacher and Carey.

316 Now, on this day, for good cause shown and pursuant to the above and foregoing stipulation, the Clerk of the above-entitled Court is hereby directed and ordered to transmit all of the United States' Exhibits and all of the Defendants' Exhibits specified in said above and foregoing stipulation in the original to the United States Supreme Court;

And it is hereby Ordered that said exhibits shall be included as and deemed a part of the Bill of Exceptions upon Writ of Error herein with the same effect in all respects as though incorporated at large in said Bill of Exceptions.

Dated: October 2nd, 1918.

M. T. DOOLING, *Judge.*

(Endorsed:) Filed Oct. 2, 1918. W. B. Maling, Clerk, by C. M. Taylor, Deputy Clerk.

317 *Certificate of Clerk U. S. District Court to Transcript on Writ of Error.*

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 316 pages, numbered from 1 to 316, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of United States of America, vs. Daniel O'Connell, et al. No. 6220, as the same now remain on file and of record in the office of the Clerk of said District Court; said Transcript having been prepared pursuant to and in accordance with the Præcipe for Record on Writ of Error (copy of which is embodied in this transcript) and the instructions of the Attorneys for Defendants and Plaintiffs in Error herein.

I further certify that the cost for preparing and certifying the foregoing transcript on Writ of Error is the sum of One Hundred Thirty Eight Dollars and Forty Five Cents ($138.45) and that the same has been paid to me by the Attorneys for Plaintiffs in Error herein.

Annexed hereto is the Original Citation on Writ of Error, (page 321) and the Original Writ of Error (page 318), with the Return of the said District Court to said Writ of Error attached thereto (page 320).

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 3rd day of October A. D. 1918.

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,
Clerk,

By C. M. TAYLOR,
Deputy Clerk.

318 (*Writ of Error.*)

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacher, Thomas Carey and E. R. Hoffman, Plaintiffs in Error, and United States of America, Defendant in Error, a manifest error has happened, to the great damage of the said Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacher, Thomas Carey, and E. R. Hoffman, Plaintiffs in Error, as by their complaint appears:

We, being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washingon, in the District of Columbia, within sixty days from the date hereof, in the said Supreme Court of the United States to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the twenty-eighth day of March, in the year of our Lord One Thousand, Nine Hundred and Eighteen.

[Seal of the U. S. District Court, Northern Dist. of California.]

W. B. MALING,
Clerk of the United States District Court for the Northern District of California,
By C. M. TAYLOR,
Deputy Clerk.

Allowed by:
WM. C. VAN FLEET,
United States District Judge.

319 [Endorsed:] Division No. 1. In the United States District Court for the Northern District of California, Southern Division. Daniel O'Connell et al., Plaintiffs in Error, vs. United States of America, Defendants in Error. Writ of Error. Filed Mar. 28, 1918. W. B. Maling, Clerk, by C. M. Taylor, Deputy Clerk.

320 *Return to Writ of Error.*

The Answer of the Judges of the District Court of the United States, for the Northern District of California, to the within Writ of Error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of The United States, within mentioned, at the day and place within contained.

We further certify that a copy of this Writ was on the 24th day of September, A. D., 1918, duly lodged in the case in this Court for the within named defendant in error.

By the Court:

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,
Clerk U. S. District Court, Northern District of California,
By C. M. TAYLOR, *Deputy Clerk.*

321 (*Citation on Writ of Error.*)

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the United States of America and John W. Preston, Esquire, United States Attorney for the Northern District of California, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the City of Washington, in the District of Columbia, within sixty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, wherein, Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacher, Thomas Carey, and E. R. Hoffman are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William C. Van Fleet, United States District Judge for the Northern District of California, this twenty-eighth day of March, A. D. 1918.

WM. C. VAN FLEET,
United States District Judge.

322 [Endorsed:] No. 6220. Division No. 1. In the United States District Court for the Northern District of California, Southern Division. Daniel O'Connell et al., Plaintiffs in Error, vs. United States of America, Defendant in Error. Citation to Defendant in Error. Filed Mar. 28, 1918. W. B. Maling, Clerk, by C. M. Taylor, Deputy Clerk.

Endorsed on cover: File No. 26,783. N. California D. C. U. S. Term No. 697. Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacher, Thomas Carey, and E. R. Hoffman, plaintiffs in error, vs. The United States of America. Filed October 10th, 1918. File No. 26,783.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

DANIEL O'CONNELL, DAVID J. SMITH, Herman B. Smith, Carl J. F. Wacher, Thomas Carey, and E. R. Hoffman, Plaintiffs in error,
v.
THE UNITED STATES OF AMERICA.
No. 697.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, and respectfully moves the advancement of the above-entitled cause for hearing during the present term.

The case arises under the Espionage Act, 40 Stat. 217, and the Selective Service Act, 40 Stat. 76.

The first count of the indictment charges conspiracy, in violation of the Espionage Act, to persuade and induce refusal to enlist in the military service of the United States by men subject thereto, and their refusal to be recruited or enlisted by selective draft and otherwise to violate the Selective Service Act and regulations of the President thereunder.

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The second count charges conspiracy, in violation of the Selective Service Act, to make, and cause to be made, false statements as to the liability for military service of the plaintiffs in error and others under said act and rules and regulations thereunder, and to aid, counsel, etc., persons subject to evade the requirements of said act and said regulations, by failing to present themselves for physical examination, etc.

Overt acts in pursuance of the conspiracy are charged.

Plaintiffs in error were convicted and have taken a direct writ of error to this court.

They are at liberty pending the hearing of the case in this court.

Notice of this motion has been served on opposing counsel.

ALEX. C. KING,
Solicitor General.

MARCH, 1919.

○

[redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

NO. 697.

DANIEL O'CONNELL, ET AL., Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

MOTION OF PLAINTIFFS IN ERROR FOR WRIT OF CERTIORARI FOR DIMINUTION OF THE RECORD.

Now come the plaintiffs in error, Daniel O'Connell, and Carl J. F. Wacker, and each of them suggest a diminution of the record in this case, and move this Honorable Court, the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States, to issue a writ of certiorari to the District Court of the United States for the Northern District of California, directing it to certify to the Supreme Court of the United States those portions hereinafter set forth as parts I, II, and III of the record of proceedings in said District Court in the action of the United States of America against Daniel O'Connell, et als., which portions were a part of the bill of exceptions submitted by the plaintiffs in error, then defendants, in said District Court, and which were struck out of said bill of exceptions on the mere suggestion of the government, then plaintiff, now defendant in error, and against the objections of the plaintiffs in error, and without any examination, or hearing whatever, all of which is hereinafter verified and for the reasons and grounds hereinafter set forth, and all of which are made a part of this motion as follows:

GROUNDS AND FACTS ON WHICH THIS MOTION IS MADE.

I.

The plaintiffs in error then defendants, duly served copies of their proposed bill of exceptions and thereafter lodged the original with the clerk of the District Court, and thereafter the Government proposed 357 amendments to said proposed bill, many of which suggested striking out large parts of said proposed bill, including the three portions hereinafter set forth, and which plaintiffs in error ask to have restored to the record by this motion for certiorari.

II.

The judge of the District Court, without any examination or hearing whatever, allowed all the amendments suggested by the Government; the plaintiffs in error on December 23, 1918, applied to the Supreme Court of the United States for a writ of mandate to said District Court to settle and sign a supplemental bill of exceptions setting forth said allowance without any examination or hearing whatever, the facts not being denied, but the Supreme Court of the United States on January 7, 1919 denied said application.

III.

After examination of the printed transcript plaintiffs in error believe that in justice to themselves as well as the case, and to the Supreme Court of the United States in the determination of the case on its merits, it is necessary to replace in the record at least three of the many portions so struck out by the allowance of said amendments, waiving for the time and convenience of the Supreme Court of the United States the restoration of the many other portions which plaintiffs in error believe favorable, but not vital, to their defence, and these three are vital.

IV.

The reasons why this motion has not been made earlier are, that the physical health and financial, personal, misfortunes of these plaintiffs in error prevented it being printed and presented sooner.

V.

The exception to the admission and reading in evidence of the records hereinafter stated as part I, and to those portions of the charge to the jury hereinafter stated as part II, were taken at the time the said evidence was offered; and at the conclusion of the charge, and before the jury retired, as is more fully stated in the affidavits filed herewith and corroborated by the official reporter's transcript and the circumstances. The action and statements of the court stated in part III, are necessary to show the prejudicial statements of those quoted portions of the charge to the jury, and also those in part I to show the prejudicial effect of the admission of said records and all of which are taken from the official transcript of the official reporter's notes of the evidence and proceedings at the trial.

VI.

Those records of those other cases, U. S. vs. Gambo, and U. S. vs. Cohen, (Part I) admitted in evidence, and read to the jury, plaintiffs in error, will claim were incompetent, immaterial, and irrelevant, and directly prejudiced.

VII.

Those portions of the charge, (Part II) plaintiffs in error will claim assumed as admitted facts, evidence which did not justify the assumption; stated certain things as facts which were not in evidence; unduly emphasized certain evidence offered by the Government; and practically directed a verdict of guilty.

VIII.

The statement of the rulings and decision in the presence of the jury denying application of Henry H. Mettler (Part III) were entirely unnecessary, and prejudical and have a direct bearing on the reference in those portions of the judge's charge (Part II) that the parties had their remedy by resorting to the writ of habeas corpus.

IX.

The following entitled "Part I", "Part II" and "Part III" are true and correct statements of proceedings in the

trial of said action in the District Court, and were taken from the official transcript of the official phonographic reporter's notes of said trial, and were incorporated in the said Bill of Exceptions lodged with the clerk of said District Court, and which parts were stricken out by the said allowance of said amendments, and which plaintiffs in error, in this motion request to be restored to the record as follows:

PART I.

The plaintiffs in error incorporated in their bill of exceptions as deposited with the clerk of the District Court the following on pages 72, 73, 74, 74a, and 75, the following:

> "I never asked Mr. O'Connell why he had not started a suit."

At this point the following questions were asked and statements made by the United States Attorney:

> "Q. Did he tell you that he had been defending men here in court who had been convicted for violating the draft act as early as June, and there had been no case started?
>
> MR. O'CONNELL: I object to that.
>
> UNITED STATES ATTORNEY: I am asking this question now.
>
> THE COURT: I think he has a right to ask him what you told him.
>
> UNITED STATES ATTORNEY: Q. Didn't he tell you he had been defending cases out here as early as June, and he had not instituted any proceedings to test the law yet?
>
> THE COURT: Mr. O'Connell here is the situation: Your defense, as I understand it—the defense of the defendants—is that being honestly of the opinion that this act was unconstitutional that you took steps to organize this corporation, the American Patriots, by reason of the fact that you felt you were entitled to

have an aggregation contribute because it was too onerous upon any one man; that you accordingly gathered together in that form, with the genuine and honest purpose of testing this law, the constitutionality of it, gathered together these people; Now, of course, there is no question but what either an individual as I shall be called upon to advise the jury—has the right in good faith to test any law that affects his rights, his liberty, his life—and as you have requested in your proposed instructions; but the prosecution certainly has the right to show that that was not the real object of this corporation at all; They have a right to show that the methods pursued were not in harmony with any such purpose at all; they have a right to show that this corporation, not only through its individual members, made declarations which were at variance with any such purpose, but issued propaganda which was of a nature to be against such a purpose; that is, I mean a purpose that went beyond any mere desire to test the act and to deter and induce others to refuse to subscribe to the act. That is all they are trying to do. That is perfectly proper. If it is found by this jury that the purposes of this corporation and the acts done under its organization were as you say and not as the prosecution claims, then, of course, you cannot be convicted; on the other hand, if it appears that the corporation was used merely as a cloak through which to reach a large number of people with a course of solicitation and representation and propaganda which would be in its nature calculated to induce others not to enlist or not to subscribe to the draft act, then the jury would have the right to find that that was the purpose of the corporation, instead of the genuine one of testing the constitutionality of the act. That is the whole question. And this is directed to that. I want you to understand the reason of my rulings as we go along.

UNITED STATES ATTORNEY: Mr. Reporter, read the question. (The question was read by the reporter.)

A. Well, I couldn't say that, I could not answer that question."

EXCEPTION NO. 18.

The United States Attorney here offered in evidence the record of the two cases of United States against Samuel Cohen and United States against Vittorio Gambo and judgment of guilty was entered against each of the defendants for failure to register, June 27, 1917, and sentencing Gambo to one hour in the custody of the Marshal and Cohen to 30 days in jail, in both of which cases Daniel O'Connell appeared for the defendants and filed a demurrer setting up the unconstitutionality of the draft act, in substantially the same manner and language as set forth in the demurrer in the present cases, and offered this demurrer for the purpose of showing that Mr. O'Connell then had an opportunity to test the draft act, and did not do it as each of the defendants served their time and has been discharged at the expiration of their time. The defendants objected to the evidence on the grounds that it was immaterial, irrelevant and incompetent and no proper foundation for it had been laid, but the court overruled the objection and admitted the demurrer and record in evidence, to which ruling and admission the defendants then and there duly excepted and designated it as Exception No. 18. And said demurrer in the Cohen case was read to the jury and the Gambo case was considered read, being in the identical language as the Cohen demurrer.

(The foregoing should have been incorporated in folio 121 in the printed transrript at the bottom of page 74.)

The said transcript of the official reporter has this memorandum on page 226:

"(The United States Attorney here introduced in evidence the minutes in the two cases of U. S. vs. Samuel Cohen and U. S. vs. Vittorio Gambo, and after considerable argument between counsel the court admitted the records in evidence and the United States Attorney read the demurrer in the Cohen case to the jury, and in the Gambo case considered it read; the

offer of the demurrer in the present case being objected to by the defendant the offer was rejected by the court.)"

PART II.

On page 172 fol. 270 of the printed transcript is the following: "The foregoing is all of the charge excepted to, and all which the defendants are allowed by the rules of the Supreme Court of the United States to insert in this bill of exceptions. But the defendants are ready, willing and hereby offer to insert the entire charge if permitted to do so."

But in the printed transcript no part of the charge is inserted. The following portions of the charge were inserted in the said bill of exceptions as lodged with the clerk of the District Court, and are the portions of the charge to which exceptions were taken, and are the portions of the charge so stricken out by the allowance of said amendment which the plaintiffs in error, by this motion request to have replaced as a part of the record in said folio 270 on page 172 of the printed record, and for convenience herein have designated it as part II.

The defendants, now plaintiffs in error, duly excepted to the following portions of the judge's charge to the jury:

"I.

Now, the theory upon which the Government's case proceeds is, in substance that the defendants have transgressed the principles I have stated and have violated the law by deliberately and intentionally entering into an unlawful combination or association to thwart, interfere with, and obstruct the carrying out and enforcement of the Selective Draft Act by a course of conduct consisting of a series of acts not only intended but calculated to accomplish this unlawful purpose; that the organization of the corporation called the American Patriots was not had in good faith with

any genuine purpose of testing this law, but was intended to be used merely as a means through which to secure funds for the use and benefit of those organizing it and with which to conduct a propaganda against the act, with the intent to hamper and defeat its execution and to use the corporation as a mask or cloak for their operations, under the mistaken idea that thereby the individual members would be shielded from responsibility for their acts; that in pursuance of this purpose the defendants and others inspired by them, issued and distributed pamphlets, circulars, advertisements on wagons, legal opinions and other literature, made public speeches and film presentations, and gave private advice to individuals, all of which was of a character to render it unlawful, and was designed and intended to inflame the minds of the people, and particularly those subject and eligible for military service, against the propriety and validity of this act and to arouse active opposition thereto and thereby persuade and induce them to refrain from enlisting in the military service or complying with the compulsory requirements of the act, and thereby to obstruct and interfere with its execution and enforcement. If you find this theory of the Government to be sustained by the evidence, then it will be your unquestioned duty to find the defendants guilty.

II.

As I had occasion to state in your presence in passing upon the motion of the defendants for an instructed verdict, there is evidence before you which is sufficient in its legal tendency, that is sufficient as matter of law, to sustain the Government's theory; but whether it is such as to satisfy you of its truth is a question wholly for your consideration and determination, as I shall more particularly instruct you.

I do not deem it necessary to review the evidence in the case at length, as is my right; you have heard it all

and, as I have observed with satisfaction, with a close and attentive ear. I may therefore leave it for your intelligent consideration, feeling full confidence that you will not overlook any of its material features and in your ability and disposition to reason only just conclusions therefrom. I should, however, notice the aspects of some of the facts which the evidence tends to establish, the tendencies of which might not otherwise be readily apprehended by the minds of laymen like yourselves, that is, men not versed in the law.

III.

Among other documents which the evidence tends to show were put out and furnished by the defendants through the American Patriots and those in its employ to people who came to its office was a so-called legal opinion admitted to have been prepared by the defendant O'Connell, a copy of which has been put in evidence. It is in the form of questions and answers for the guidance of men seeking advice on the subject of the draft, and in its contents these questions and answers are found: '2nd. Will they report to exemp-'tion or examination boards? Ans. As the boards 'might have them take the oath or sign some papers 'putting them in the military service, the safest way is 'not to go, but simply file an affidavit of exemption, as 'the best and safest way of testing the law. 3rd. If 'they refuse to go are they under military law? A. No, 'they are not. 4th. Can the military authorities pro-'ceed against them? A. No. Also: If the law is de-'clared constitutional, then the worst that can happen 'is that the defendants will have to serve a year in 'jail.'

These answers do not state the law. In the rules and regulations promulgated by the President in accordance with the terms of the Selective Service Law is this: 'Each district board shall certify in quadruplicate 'forms provided by the Provost Marshal General for

'that purpose, to the adjutant general of the State, 'Territory, or District of Columbia, as the case may be, 'the serial numbers, names, and detailed addresses of 'all persons called by the local boards within the juris- 'diction of such district board who have not been ex- 'empted or discharged; separate certificates shall be 'made in respect of the men called by each of the sev- 'eral local boards. Upon receipt of such addresses shown 'in the certificates notify each man whose name has 'been so certified that he has been selected for military 'service and shall order him to report for military ser- 'vice in person at a specified time and place, to be fixed 'pursuant to advices from the Adjutant General of 'the army. From the time so specified each man to 'whom such notice shall have been so mailed shall be 'in the military service of the United States.' This rule the President was duly empowered to make and is a perfectly valid regulation. In accordance with its terms, where a drafted man has been notified as there provided, that he has been selected for service and is ordered to report for duty, he is from that moment in the military service and subject to military law, and for a refusal to obey the order may be proceeded against by the military authorities and forcibly arrested if need be. Nor is it the law that if the act be held constitutional the worst that can happen to the person arrested for failing to report is a punishment of one year in jail. He may not only be thus punished, but may then be required to give his service in the Army. And it is not the law, as contended at the trial by defendants, that if a man reports for service in obedience to the notice to appear he then loses any right to resort to the civil courts to test the validity of his compulsory service. As I had occasion to say earlier in the trial, if he deems the law under which he is taken to be invalid or unconstitutional he will still have his remedy by habeas corpus to test its validity. The civil courts may in any case inquire into the validity of the pro-

cess or warrant under which a citizen is detained against his will, whether in the army or elsewhere. The advice given in this opinion was therefore erroneous and misleading as not stating the law. It does not follow, of course, that one may be held guilty of an offence for giving mistaken advice as to the law. If it is given in good faith as representing the honest though mistaken views of the party giving it, it is not in itself criminal; but you have a right in connection with all other circumstances to consider its erroneous character in determining whether it was given in good faith and for an honest purpose as is the claim made here, or was intended as part of a scheme to obstruct the enforcement of this law.

IV.

There is also evidence tending to show that there was prepared by the defendant O'Connell a form of exemption claim to be presented and filed with the local boards for those who were notified to report for examination and that large numbers of these forms were furnished to those who joined the American Patriots for their use before those boards, with the direction to present them to be filed, and that a considerable number were tendered by young men who objected to service. That among other things stated in this form was this language: 'I am certain that notwith-'standing all the humbug and lies published in the 'newspapers and other publications of the world, there 'is not, and cannot be the slightest danger to the 'United States, as this war is simply a war of aggres-'sion, conquest, and greed on the part of England, and 'England and her agents have secured a vote of Con-'gress assisting them in this war, which vote was in 'violation of the Constitution and will be reconsidered 'by the next Congress, who will have full power and 'express directions from the people.' You are advised that the matter thus stated was wholly unnecessary to

the statement of any legal objection the so-called exemption claim may have otherwise set up; that it would subserve no good or useful purpose in support of any such objection but was well calculated to create antagonism in the minds of those to whom it was furnished, to the law in question and induce them to oppose and refrain from conforming to its requirements and thereby bring about obstruction to its enforcement. You have a right, therefore, to consider it in the light of all the other facts and circumstances in the case in determining whether the purpose of the defendants in putting it forth was the legitimate and innocent one they claim or was in fact intended to subserve the purpose claimed by the Government of provoking and inducing obstruction to the enforcement of this Selective Service Law.

V.

The evidence also tends to show that the defendants and other members of the American Patriots and persons in their employ put forth and disseminated large numbers of what are denominated in the evidence as 'Membership Circulars', circulars soliciting membership in their organization; these circulars, among other things, containing this language:

'The American Revolution was fought, won, and the 'Republic established, by "Sons of Liberty", an or-'ganized minority, in spite of the opposition of Tories, 'grafters and grovellers, before wealth and office in 'those days, assisted as they were by the purchased 'press, suppressing the truth and publishing lies, for 'the purpose of scaring or humbugging the people. At 'present all that these American heroes fought for and 'won is in extreme danger of being lost. To save the 'Republic we have therefore organized the American 'Patriots.'

This language, when read in connection with the other statements has a distinct tendency to engender

opposition and resentment against the act in question and to induce refusal to comply with its requirements, and you have a right to consider it with all the other circumstances in determining whether the purpose of those sending it forth, if you find that it was so sent, was the innocent one they claim or the one claimed for it by the Government.

VI.

There is also evidence tending to show that on July 3rd, the defendant Herman B. Smith made an address or speech at a public meeting in Dreamland Rink in this City, in which he used this language, in speaking of this act:

'On September 1st. we are going to have a big lottery 'in this country to see which ones of us go over there 'first to be slaughtered. There are a lot of boys who 'do not want to go; they would undoubtedly be willing 'to die in America or to go and take part in the wars 'of this country. Now these boys' friends, are going to 'demand that we stand by them. Every one of us here 'who are above the age must do his share in aiding 'those boys to stand firm in their conscience and say 'they will not go. There is an organization throughout 'the whole nation to see that their fight is taken care 'of. We want you to help. We have started one in 'San Francisco, here and there are others being started 'and we want you to give your assistance. The Gov-'ernment has asked you to buy Liberty Bonds, finance 'the war and give our boys to be maimed and killed. 'We want to save our boys at home, to save them from 'going to the Hell in Europe. Let us stay here and help 'them. Any money that you pay tonight after defray-'ing the expenses of this meeting will go to save our 'boys.'

This language, if not distinctly seditious in character, was at least outside and beyond any such purpose as claimed by the defendants as the objects they had in

view, and its natural and only tendency would be to inflame the minds of the public and sway it against the act in question and induce them to oppose and obstruct its enforcement. It was therefore wholly unjustified for any innocent purpose and was not protected by the right of free speech or otherwise, and you have the right to so consider it in determining the defendant's purpose.

VII.

In that connection there is also evidence tending to show that the defendant O'Connell, at a public speech at Lodi on August 4, in contending that the act in question was unconstitutional and that it could not be legally enforced, among other things advised those present not to take the oath or sign any papers whatsoever that would put them in the service, and declared that the men who left the United States for Europe would not return: That the average life of a soldier in the trenches was forty-eight hours, and said in substance, 'I wonder if it is forty-eight hours, with those machine 'guns on both sides throwing bullets so fast that when 'a man throws up his head he is gone and when they 'stick up their bodies to run across "No Man's Land" '—you wonder how they last forty-eight hours'; that he stated a large number of test cases would be started; that each case would be a separate case, and if a man should be ordered into the service before he could get his case tested the worst that could happen to him would be that he would stay in jail until it was decided, or be out on bail; but that the new Congress would be elected and would repeal the draft law; that the war was not a war of defense, and that the Constitution was being violated because it did not allow them to take soldiers out of the country. If you find this evidence to be true, the advice thus given and the declarations made were not within the right of Mr. O'Connell in any purpose he may have had to test this law nor to secure aid with which to make such test nor

by any right of free speech in connection with such object, and you have a right to so consider it in determining the real purpose for which the language was uttered.

VIII.

It is not incumbent on the Government, notwithstanding the offense is so charged, to necessarily show that all the parties alleged to have been concerned in that conspiracy were in fact participants in it in order to convict any of them. Because all the defendants on trial are included in one indictment and tried together it is not required that you convict all in order to convict any; or that if you acquit one you must acquit all. If you find that there was a conspiracy as charged, and that any one of the defendants on trial was a party to it, you may convict him although acquitting the others.

It makes no difference how honest their views may have been; as I have said to you, if they have done acts which under the law would result in obstructing the execution of this statute, and there was a combination between them for the purpose, then they are guilty.

IX.

MR. O'CONNELL: Your Honor said something about a considerable of these claims of exemption having been presented. According to the evidence here I think there is only about half a dozen of them,—I think two or three here.

THE COURT: Well, three would be a considerable number of an illegal document.

X.

MR. O'CONNELL: I want to call your Honor's attention to that part in regard to conspiracy, that the existence of the conspiracy may be shown by circumstantial evidence. I want to except to that portion of it.

THE COURT: In 99 cases out of 100, perhaps, that

is the only way it ever is shown or can be shown. The reason for it is this: Men engaged in an unlawful enterprise do not as a rule openly declare their purposes, or the fact that they are working in combination; and so it must be determined by circumstances; as I said to the jury, when so determined, and they are satisfied that the combination existed, it does not make any difference whether there was ever any declaration about it.

MR. O'CONNELL: But where the acts are open then the existence of the conspiracy cannot be established by inference, but must be established directly.

THE COURT: Actions that are susceptible of proof must be open in that sense; they may be secret in a way, but they must be susceptible of proof, otherwise they exist merely in the mind and never become overt acts.

XI.

MR. O'CONNELL: Now one thing more: There was one thing that if you find the effect it makes no difference that they didn't know,—it was something like that, your honor; I wish your Honor would qualify that by saying that it must be the necessary effect.

THE COURT: Oh yes, of course. The law is this: A man is presumed to intend the ordinary consequences of his voluntary act. That results in this: It does not make any difference whether one may know the exact legal consequences of an act he does; if he deliberately does the act, he must know at his peril whether it would result in criminal consequences, or not, because of the further principle that ignorance of the law does not excuse. You can readily understand that if ignorance of the law did excuse, it could always be urged as a defense, no matter how heinous the charge might be. As a matter of expediency it has been found necessary to adopt as a part of our jurisprudence, the principle that ignorance of the law will not excuse for a crim-

inal act. And it does not make any difference, Mr. O'Connell, so long as one deliberately does an act—it does not make any difference I say whether he knows its legal consequences, or not.

MR. O'CONNELL: But if the result of the act is an incident and not a necessary consequence then he is not responsible for the incidental act; it must be the necessary and natural consequence of what he does.

THE COURT: Yes, the usual and ordinary consequences,—what they term the natural consequences."

PART III.

In the said proposed bill of exceptions so lodged with the clerk of said District Court on pages 212, 213, and 214 during the cross-examination of the defendant David J. Smith by the United States Attorney, said cross-examination was interrupted and the following proceedings took place as stated in said bill of exceptions on page 212: "At this point the following announcements were made by the court, and answers thereto by the counsel, (all in the presence of the jury.)"

"THE COURT: In the matter of the petition of Henry H. Mettler for a writ of habeas corpus, presented on Friday last, I have given the petition examination in the light of the provisions of the Constitution, the main contention being that the petitioner is held in custody by reason of proceedings taken under the Selective Service Law and that law is an antagonism to the Constitution of the United States. I have carefully examined the provisions of the Constitution and the provisions of this law in the light of it, and I am entirely satisfied that there is nothing within the provisions of this law which would render it obnoxious to any provision of the Constitution which fell under my observation. While it is not stated in this petition it has been sufficiently manifested at the present trial that the real objection to this act is that it contemplates

sending troops abroad; for the purposes of the present war for their participation therein; in the first place, there is nothing in this law which in any wise in itself could be regarded as having that purpose in view, but, in the next place, if there be contemplated such action, and doubtless there is, because we cannot ignore facts which are of public cognizance, in my view there is absolutely nothing in the Constitution which would inhibit such a disposition of our troops in a time of necessity and for the purpose of carrying on the war in which we are engaged in such manner and by such means as will best conduce to its speedy and its successful conclusion.

The petition for a writ of habeas corpus will accordingly be denied.

MR. O'CONNELL: We will take an appeal. Will your Honor fix the bail?

THE COURT: I will consider that later; you can make an application. Where is the defendant now?

MR. O'CONNELL: He is up in the Stockton jail.

MR. PRESTON: As I understand it the defendant is in charge of the military already.

MR. O'CONNELL: He is in charge of the sheriff in the Stockton jail.

THE COURT: He may be in the immediate custody of the sheriff of San Joaquin County, but nevertheless his custody may be under the direction of the military authorities.

MR. PRESTON: I am informed, unless Mr. O'Connell has information to the contrary, that this prisoner is at Alcatraz, having been taken there yesterday or the day before.

MR. O'CONNELL: That is news to me.

THE COURT: You can examine into the situation and present your application at a future time.

MR. O'CONNELL: May I present an amended pe-

tition, if your Honor please, if the facts justify it, so that the entire question will go up?

THE COURT: Then the order will simply be that this petition be denied. You have a right to present any further petition that you see fit."

(The foregoing statements from the bill of exceptions and from the reporter's transcript should have been inserted in the printed transcript on page 147 in fol. 234, at line 18 on that page.)

VERIFICATION.

The affidavits of plaintiffs in error, Daniel O'Connell and Carl J. F. Wacker, are hereto attached, and made a part of this motion. Printed copies of this motion have been served on defendant in error.

Wherefore, said plaintiffs in error move this Honorable Court, the Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States, to restore said portions of the bill of exceptions to the record of said action, on appeal in this court, and for that purpose to issue its writ of certiorari to the said District Court of the United States for the Northern District of California as aforesaid.

DANIEL O'CONNELL
CARL J. F. WACKER pro sese.
JOSEPH L. TEPPER
Attorney for other Plaintiffs in Error.

STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO—SS

Daniel O'Connell and Carl J. F. Wacker being duly sworn, deposes and says each for himself, as follows: I am one of the plaintiffs in error in the above entitled action of Daniel O'Connell et al., vs. the United States of America, pending in the Supreme Court of the United States. Said Daniel O'Connell was the only attorney for the defendants, except the defendant David J. Smith, and Herman B. Smith during the trial of said action in the District Court. I was present during all of said trial and heard everything that was said by the judge, and said Daniel O'Connell, as well as the witnesses during said trial. I have carefully read this motion for certiorari, and especially the grounds and facts on which said motion is made and the statement contained in parts I, II, and III, and all hereinbefore set forth. I know of my own personal knowledge that each and all of the statements alleged to have been made by the judge of said District Court, at said trial and in his charge to the jury, and also the statements made by said Daniel O'Connell and John W. Preston the United States Attorney as set forth herein, are each and all true and correct. I have also read the official transcript of the official reporter's notes taken at said trial, and the extracts therefrom, as hereinbefore set forth in this motion, are each and all correct and true. I was present and distinctly remember that there was strenuous objection on the part of said Daniel O'Connell, and heated arguments by him against the admission in evidence of the records in the case of United States against Gambo, and the United States against Cohen, and equally heated arguments on the part of said John W. Preston on the admission of said records in evidence; and when the court finally ruled admitting them in evidence, said Daniel O'Connell then and there stated that he excepted to said ruling.

I distinctly remember that at the close of the judge's charge, and before the jury retired, Judge Van Fleet asked if there were any objections or exceptions to his charge,

and Mr. O'Connell stated several objections, some of which are set forth in this motion, and I remember distinctly that said Daniel O'Connell excepted to those portions of the judge's charge, wherein the judge specifically mentioned certain evidence of the acts of Mr. O'Connell, especially his going to Lodi, and his speech at Lodi, and the other portions of the evidence picked out by the judge of which Mr. O'Connell then did not have a transcript, and could not quote at that time, but all the defendants understood, and the judge and everybody else seemed to understand, that the portions of said charge so objected to, and excepted to, were those stated in this motion, and designated as "part II" in this motion.

The language of said Daniel O'Connell, as substantially stated in the said official reporter's transcript and as I personally remember it as used by Mr. O'Connell, in his statement of exceptions to those portions of the judge's charge, was substantially as follows: "I except to those portions of your Honor's charge where you picked out certain evidence, and told the jury that if that was true it was sufficient to convict, especially that part referring to my going to Lodi, and my speech at Lodi, and the circular letters, and the quotations from the O'Connell claim of exemption, and the speeches of the Smith boys." The answer of the judge at the time was in substance: "Very well, the jury will now retire." The objection to those portions of the charge of the judge was also stated in the motion for new trial and are on page 173, folio 272, subdivision 11 of the printed transcript filed in the Supreme Court of the United States.

DANIEL O'CONNELL
CARL J. F. WACKER

Subscribed and sworn to by Daniel O'Connell and Carl J. F. Wacker, each for himself, this eighth day of May A. D. 1919.

JOHN L. MURPHY,
Notary Public in and for the city and county of San Francisco, State of California. (SEAL)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

No. [redacted]221

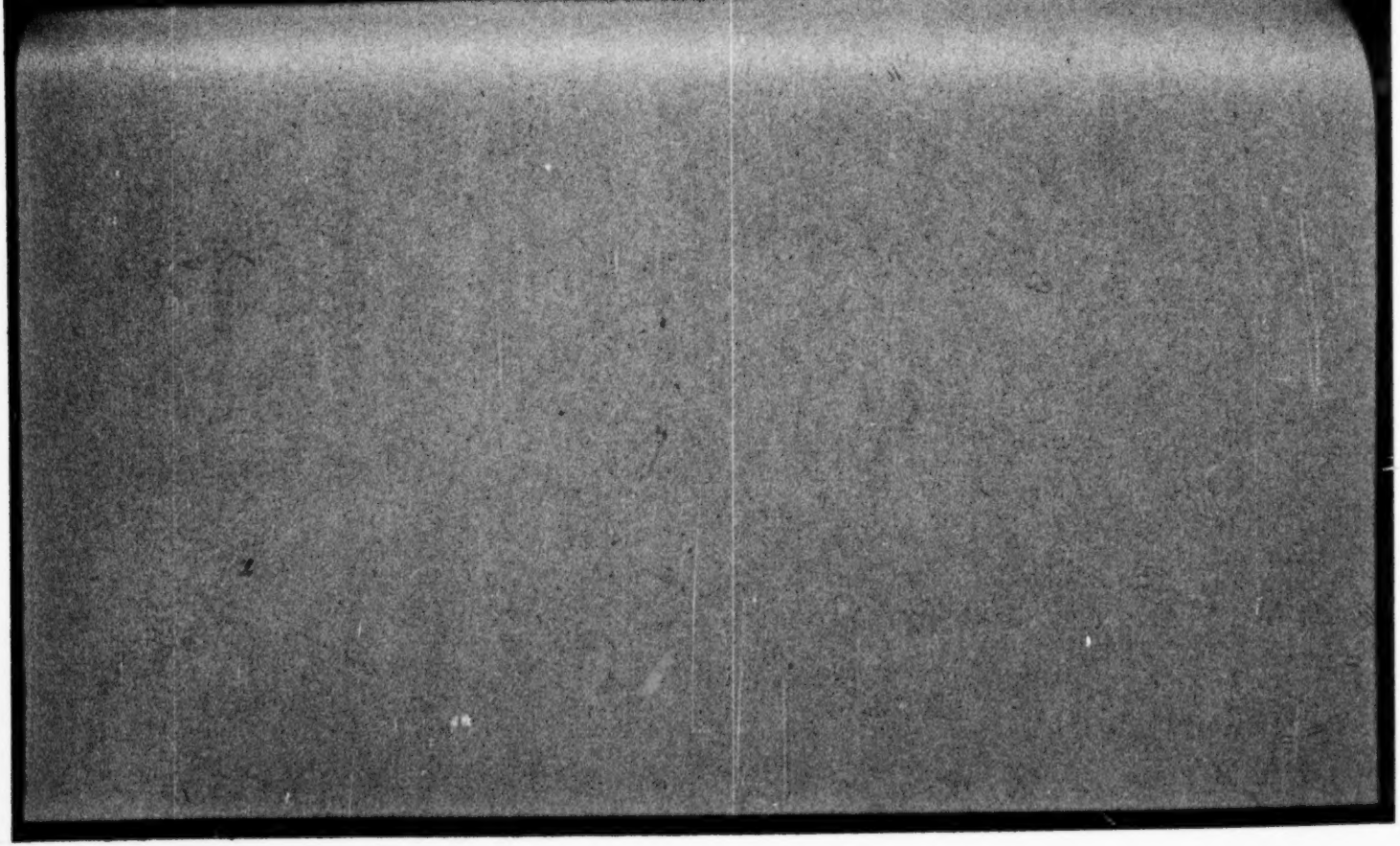
DANIEL O'CONNELL, et als.,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

MOTION OF PLAINTIFFS IN ERROR FOR LEAVE TO FILE AMENDED ASSIGNMENT OF ERRORS.

DANIEL O'CONNELL,
CARL J. F. WACKER,
pro sese.



IN THE

Supreme Court of the United States

OCTOBER TERM 1918.

No. 697.

DANIEL O'CONNELL, et als.,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

MOTION OF PLAINTIFFS IN ERROR FOR LEAVE TO FILE AMENDED ASSIGNMENT OF ERRORS.

Now come plaintiffs in error, Daniel O'Connell and Carl J. F. Wacker, and move this Honorable Court, the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States, for leave to file an amended assignment of errors in the above entitled cause, said amended assignment of errors being hereto attached and made a part of this motion; the grounds and facts on which this motion is made are the following:

GROUNDS AND FACTS ON WHICH THIS MOTION IS BASED.

I.

The amendments suggested will not injure the defendant in error, but will benefit, in that they bring the mind of counsel for defendant to the precise points on which plaintiffs in error will rely, and are stated with more perspicuity and eliminate others which might come within "plain errors" in the assignment as filed.

II.

The defects in the assignment of errors as filed, have not prejudiced defendant in error, as the bill of exceptions is the basis of the assignment of errors, and it was not printed until January 1919; the application for mandamus to compel the settlement and signing of a supplemental bill of exceptions was denied January 7, 1919, and the motion for certiorari for dimuntion of the record adds only two exceptions, one to the admission of certain evidence, and the other to certain portions of the judge's charge to the jury.

III.

The defects sought to be remedied by this amended assignment of errors are mostly all, particulars of form, and can be, and are, remedied by reference to the accompanying record with which record, counsel for defendant in error are familiar, and the amendment points out with more particularity the parts of said record in which the errors are contained and materially assists Court and counsel.

IV.

All of the errors assigned, were claimed by exceptions taken during the trial, and all except the two

contained in the motion for certiorari, are in said printed record; but owing to othe poverty and inability of the plaintiffs in error, to secure any transcript of any part of the official court reporter's notes until long after the sentence and filing of the petition for writ of error, all of which was done rapidly on the same day, the plaintiffs in error were not allowed time enough in which to prepare and file a more detailed, or full statement of the errors claimed as required by the rules and decisions of the Supreme Court of the United States.

V.

The case is set for argument October 13, 1919, and there is time to incorporate an amended assignment of errors in the briefs, and it is also to give the counsel for defendant in error plenty of time to prepare to meet the claims of plaintiffs in error, and to avoid any claim at that time that the errors argued were not properly assigned as required by said rules and decision, that plaintiffs in error, move at this time for leave to file the amended assignment of errors.

VI.

Plaintiffs in error cannot find any decision of this court directly on the points of this motion, but amended assignments of error are allowed in the appellate courts of the various states and in some of the Federal Courts and the same reasons for the application of the rule applies to this case at bar, and it comes within the reason of the decisions of this Honorable Court that it prefers to hear appeals on their merits, as in Wiborg vs. United States, 163 U. S. 632, 633; Clyatt vs. United States, 197 N. S. 207; Davis vs. Packard, 7 Peters, 276; Phillips vs. Seymour, 91 U. S. 646, 648; Edwards vs. Elliott, 21 Wall, 550; Woodward vs. Brown, 13 Pet. 5; Hickory vs. United States, 160

U. S. 414. In nearly all the states and in some of the Circuit Courts of Appeal amended assignments of errors are allowed to be filed.

This motion comes within the reason and object of the rule and law requiring an assignment of errors to enable the court and opposing counsel to see what points the plaintiffs' counsel intend to ask a reversal of the judgment, and to limit the discussion to those points.

VII.

Copies of this motion and amended assignment of errors have been duly served on defendant in error.

DANIEL O'CONNELL,
CARL J. F. WACKER,

JOSEPH L. TEPPER,
Attorney for other Plaintiffs in Error.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER 1918 TERM

NO. 697

DANIEL O'CONNELL, et al.,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

AMENDED ASSIGNMENT OF ERRORS.

I.

The District Court erred in not granting the motion in arrest of judgment, which motion was made, "because of which said errors in the record herein, no lawful judgment can be rendered by the court upon the record in this cause." And the record showed the following indefinite, uncertain, insufficient verdict (Tr. p. 172, f. 270) as follows: "We the jurors find the defendants (naming them all) guilty on the..... count on the.....count. Thomas H. Haskins foreman", which verdict certainly does not find the defendants guilty on both counts; if on either count. The first count was for a felony, and the second count was for a misdemeanor; and from that verdict the court was unable to find whether the defendants were convicted of a misdemeanor, or of a felony.

II.

The District Court erred in making its judgment, and sentence in said action; in that it imposed on the defendant, Daniel O'Connell, a sentence on the first count of five years in the Federal Penitentiary at McNeils Island, Washington, and on the second count, two years in the same prison, both to run consecutively; and upon the defendant Carl J. F. Wacker, on the first count a sentence of eighteen months, and eighteen months on the second count of the indictment, at the same prison, terms to run concurrently and a fine in the sum of $250.00. Said sentences are null and void, because there is no verdict of guilty on both counts; if on either, it is impossible to tell on which count. The second count is under the draft act of May 18, 1917, which specifically fixes the punishment which is not more than one year in jail, and the punishment inflicted, or pretended to be inflicted, was in excess of that which the court could have imposed if there had been a verdict of guilty on the second count. (Tr. p. 192, fol. 303.)

III.

DENIAL OF NEW TRIAL.

The District Court erred, and abused its discretion in denying the motion for new trial, (Tr. p. 192, fol. 303), for the reasons set forth in said motion, (Tr. p. 189, 190, fols. 298, 299), which are all in this assignment of errors all then within the knowledge of said District Court and judge at the time of said denial.

IV.

CHARGE TO THE JURY.

The District Court and District Judge erred in the charge to the jury in making to them the following statements:

"I.

"Now, the theory upon which the Government's case proceeds is, in substance that the defendants have transgressed the principles I have stated and have violated the law by deliberately and intentionally entering into an unlawful combination or association to thwart, interfere with, and obstruct the carrying out and enforcement of the Selective Draft Act by a course of conduct consisting of a series of acts not only intended but calculated to accomplish this unlawful purpose; that the organization of the corporation called the American Patriots was not had in good faith with any genuine purpose of testing this law, but was intended to be used merely as a means through which to secure funds for the use and benefit of those organizing it and with which to conduct a propaganda against the act, with the intent to hamper and defeat its execution and to use the corporation as a mask or cloak for their operations, under the mistaken idea that thereby the individual members would be shielded from responsibility for their acts; that in pursuance of this purpose the defendants and others inspired by them issued and distributed pamphlets, circulars, advertisements on wagons, legal opinions and other literature, made public speeches and film presentations, and gave private advice to individuals, all of which was of a character to render it unlawful, and was designed and intended to inflame the minds of the people, and particularly those subject and eligible for military service, against the propriety and validity of this act and to arouse active opposition thereto and thereby persuade and induce them to refrain from enlisting in the military service or complying with the compulsory require-

ments of the act, and thereby to obstruct and interfere with its execution and enforcement. If you find this theory of the Government to be sustained by the evidence, then it will be your unquestioned duty to find the defendants guilty.

"II.

"As I had occasion to state in your presence in passing upon the motion of the defendants for an instructed verdict, there is evidence before you which is sufficient in its legal tendency, that is sufficient as a matter of law, to sustain the Government's theory; but whether it is such as to satisfy you of its truth is a question wholly for your consideration and determination, as I shall more particularly instruct you.

"I do not deem it necessary to review the evidence in the case at length, as is my right; you have heard it all and, as I have observed with satisfaction, with a close and attentive ear. I may therefore leave it for your intelligent consideration, feeling full confidence that you will not overlook any of its material features and in your ability and disposition to reach only just conclusions therefrom. I should, however, notice the aspects of some of the facts which the evidence tends to establish, the tendencies of which might not otherwise be readily apprehended by the minds of laymen like yourselves, that is, men not versed in the law.

"III.

"Among other documents which the evidence tends to show were put out and furnished by the defendants through the American Patriots and those in its employ to people who came to its office was a so-called legal opinion admitted to have

been prepared by the defendant O'Connell, a copy of which has been put in evidence. It is in the form of questions and answers for the guidance of men seeking advice on the subject of the draft, and in its contents these questions and answers are found:

"'2nd. Will they report to exemption or examination boards? Ans. As the boards might have them take the oath or sign some papers putting them in the military service, the safest way is to not go, but simply file an affidavit of exemption, as the best and safest way of testing the law. 3rd. If they refuse to go are they under military law? A. No, they are not. 4th. Can the military authorities proceed against them? A. No. Also: If the law is declared Constitutional, then the worst that can happen is that the defendants will have to serve a year in jail.'

"These answers do not state the law. In the rules and regulations promulgated by the President in accordance with the terms of the Selective Service Law is this: 'Each district board shall certify in quadruple forms provided by the Provost Marshal General for that purpose, to the adjutant general of the State, Territory, or District of Columbia, as the case may be the serial numbers, names, and detailed addresses of all persons called by the local boards within the jurisdiction of such district board who have not been exempted or discharged; separate certificates shall be made in respect of the men called by each of the several local boards. Upon receipt of such addresses shown in the certificates notify each man whose name has been so certified that he has been selected for military service and shall

'order him to report for military service in person 'at a specified time and place, to be fixed pursuant 'to advices from the Adjutant General of the 'Army. From the time so specified each man to 'whom such notice shall have been so mailed shall 'be in the military service of the United States.'

"This rule the President was duly empowered to make and is a perfectly valid regulation. In accordance with its terms, where a drafted man has been notified as there provided, that he has been selected for service and is ordered to report for duty, he is from that moment in the military service and subject to military law, and for a refusal to obey the order may be proceeded against by the military authorities and forcibly arrested if need be. Nor is it the law that if the act be held constitutional the worst that can happen to the person arrested for failing to report is a punishment of one year in jail. He may not only be thus punished, but may then be required to give his service in the Army. And it is not the law, as contended at the trial by defendants, that if a man reports for service in obedience to the notice to appear he then loses any right to resort to the civil courts to test the validity of his compulsory service. As I had occasion to say earlier in the trial, if he deems the law under which he is taken to be valid or unconstitutional he will still have his remedy by habeas corpus to test its validity of his compulsory service. As I had occasion to say earlier in the trial, if he deems the law under which he is taken to be valid or unconstitutional he will still have his remedy by habeas corpus to test its validity. The Civil courts may in any case inquire into the validity of the process of warrant under which a citizen is detained against his will,

whether in the army or elsewhere. The advice given in this opinion was therefore erroneous and misleading as not stating the law. It does not follow, of course, that one may be held guilty of an offense for giving mistaken advice as to the law. If it is given in good faith as representing the honest though mistaken view of the party giving it, it is not in itself criminal; but you have a right in connection with all other circumstances to consider its erroneous character in determining whether it was given in good faith and for an honest purpose as is the claim made here, or was intended as part of a scheme to obstruct the enforcement of this law.

"IV.

"There is also evidence tending to show that there was prepared by the defendant O'Connell a form of exemption claim to be presented and filed with the local boards for those who were notified to report for examination and that large numbers of these forms were furnished to those who joined the American Patriots, for their use before those boards, with the direction to present them to be filed, and that a considerable number were tendered by young men who objected to service; that among other things stated in this form was this language: 'I am certain that notwithstanding all 'the humbug and lies published in the nswspapers 'and other publications of the world, there is not 'and cannot be the slightest danger to the United 'States, as this war is simply a war of aggression, 'conquest, and greed on the part of England, and 'England and her agents have secured a vote of 'Congress assisting them in this war, which vote 'was in violation of the Constitution and will be 'reconsidered by the next Congress, who will have

'full power and express directions from the peo-'ple.' You are advised that the matter thus stated was wholly unnecessary to the statement of any legal objection the so-called exemption claim may have otherwise set up; that it would subserve no good or useful purpose in support of any such objection but was well calculated to create antagonism in the minds of those to whom it was furnished, to the law in question and induce them to oppose and refrain from conforming to its requirements and thereby bring about obstruction to its enforcement. You have a right, therefore, to consider it in the light of all the other facts and circumstances in the case in determining whether the purpose of the defendants in putting it forth was the legitimate and innocent one they claim, or was, in fact, intended to subserve the purpose claimed by the Government of provoking and inducing obstruction to the enforcement of this Selective Service Law.

"V.

"The evidence also tends to show that the defendants and other members of the American Patriots and persons in their employ put forth and disseminated large numbers of what are denominated in the evidence as 'Membership Circulars,' circulars soliciting membership in their organization; these circulars among other things, contain this language:

"'The American Revolution was fought, won, 'and the Republic established, by "Sons of Lib-'erty", an organized minority, in spite of the op-'position of Tories, grafters and grovellers, be-'fore wealth and office in those days, assisted as 'they were by the purchased press, suppressing

'the truth and publishing lies, for the purpose of 'scaring or humbugging the people. At present 'all that these American heroes fought for and 'won is in extreme danger of being lost. To save 'the Republic we have therefore organized the 'American Patriots.'

"This language, when read in connection with the other statements has a distinct tendency to engender opposition and resentment against the act in question, and to induce refusal to comply with its requirements, and you have a right to consider it with all the other circumstances in determining whether the purpose of those sending it forth, if you find that it was so sent, was the innocent one they claim or the one claimed for it by the Government.

"VI.

"There is also evidence tending to show that on July 3rd, the defendant Herman B. Smith made an address or speech at a public meeting in Dreamland Rink in this city in which he used this language, in speaking of this act:

'On September 1st. we are going to have a big 'lottery in this country to see which ones of us go 'over there first to be slaughtered. There are a 'lot of boys who do not want to go; they would 'undoubtedly be willing to die in America or to go 'and take part in the wars of this country. Now 'those boys' friends, are going to demand that we 'stand by them. Everyone of us here who are 'above the age must do his share in aiding those 'boys to stand firm in their conscience and say 'they will not go. There is an organization 'throughout the whole nation to see that their fight 'is taken care of. We want your help. We have

'started one in San Francisco, here and there are 'others being started and we want you to give 'your assistance. The Government has asked you 'to buy Liberty Bonds, finance the war and give 'our boys to be maimed and killed. We want to 'save our boys at home, to save them from going 'to the Hell in Europe. Let us stay here and help 'them. Any money that you pay tonight after de- 'fraying the expenses of this meeting will go to 'save our boys.'

"This language if not distinctly seditious in character, was at least outside and beyond any such purpose as claimed by the defendants as the objects they had in view, and its natural and only tendency would be to inflame the minds of the public and sway it against the act in question and induce them to oppose and obstruct its enforcement. It was therefore wholly unjustified for any innocent purpose and was not protected by the right of free speech or otherwise, and you have the right to so consider it in determining the defendant's purpose.

"VII.

"In that connection there is also evidence tending to show that the defendant O'Connell, at a public speech at Lodi on August 4, in contending that the act in question was unconstitutional and that it could not be legally enforced, among other things advised those present not to take the oath or sign any papers whatsoever that would put them in the service, and declared that the men who left the United States for Europe would not return. That the average life of a soldier in the trenches was forty-eight hours, and said, in substance: 'I wonder if it is forty-eight hours, with 'those machine guns on both sides throwing bullets

'so fast that when a man throws up his head he 'is gone and when they stick up their bodies to 'run across "No Man's Land"—you wonder how 'they last forty-eight hours.' That he stated a large number of test cases would be started; that each case would be a separate case, and if a man should be ordered into the service before he could get his case tested the worst that could happen to him would be that he would stay in jail until it was decided, or be out on bail; but that the new Congress would be elected and would repeal the draft law; that the war was not a war of defense, and that the Constitution was being violated because it did not allow them to take soldiers out of the country. If you find this evidence to be true, the advice thus given and the declarations made were not within the right of Mr. O'Connell in any purpose he may have had to test this law nor to secure aid with which to make such test nor by any right of free speech in connection with such object, and you have a right to so consider it in determining the real purpose for which the language was uttered.

"VIII.

"It is not incumbent on the Government, notwithstanding the offense is so charged, to necessarily show that all the parties alleged to have been concerned in that conspiracy were in fact participants in it in order to convict any of them. Because all the defendants on trial are included in one indictment and tried together it is not required that you convict all in order to convict any; or that if you acquit one you must acquit all. If you find that there was a conspiracy as charged, and that any one of the defendants on

trial was a party to it, you may convict him although acquitting the other.

"It makes no difference how honest their views may have been; as I have said to you, if they have done acts which under the law would result in obstructing the execution of this statute, and there was a combination between them for the purpose, then they are guilty.

"IX.

"Mr. O'Connell: Your Honor said something about a considerable of these claims of exemption having been presented. According to the evidence here I think there is only about half a dozen of them,—I think two or three here.

"The Court: Well, three would be a considerable number of an illegal document.

"X.

"Mr. O'Connell: I want to call your Honor's attention to that part in regard to conspiracy, that the existence of the conspiracy may be shown by circumstantial evidence. I want to except to that portion of it.

"The Court: In 99 cases out of 100, perhaps, that is the only way it ever was shown or can be shown. The reason for it is this: Men engaged in an unlawful enterprise do not as a rule openly declare their purposes, or the fact that they are working in combination; and so it must be determined by circumstances; as I said to the jury, when so determined, and they are satisfied that the combination existed, it does not make any difference whether there was ever any declaration about it.

"Mr. O'Connell: But where the acts are open

then the existence of the conspiracy cannot be established by inference, but must be established directly.

"The Court: Actions that are susceptible of proof must be open in that sense; they may be secret in a way, but they must be susceptible of proof, otherwise they exist merely in the mind and never become overt acts.

"XI.

"Mr. O'Connell: Now one thing more: There was one thing that if you find the effect it makes no difference that they didn't know,—it was something like that, your Honor. I wish your Honor would qualify that by saying that it must be the necessary effect.

"The Court: Oh yes, of course. The law is this: A man is presumed to intend the ordinary consequences of his voluntary act. That results in this: It does not make any difference whether one may know the exact legal consequences of an act he does; if he deliberately does the act he must know at his peril whether it would result in criminal consequences, or not, because of the further principle that ignorance of the law does not excuse. You can readily understand that if ignorance of the law did excuse, it could always be urged as a defence no matter how heinous the charge might be. As a matter of expedience it has been found necessary to adopt as a part of our jurisprudence, the principle that ignorance of the law will not excuse for a criminal act. You can readily understand that if ignorance of the law did excuse it could always be urged as a defense no matter how heinous the charge might be. As a matter of expedience it has been found necessary

to adopt as a part of our jurisprudence, the principle that ignorance of the law will not excuse for a criminal act. And it does not make any difference Mr. O'Connell, so long as one deliberately does an act—it does not make any difference I say whether he knows its legal consequences, or not.

"Mr. O'Connell: But if the result of the act is an incident and not a necessary consequence, then he is not responsible for the incidental act; it must be the necessary and natural consequence of what he does.

"The Court: Yes, the usual and ordinary consequences—what they term the natural conseconsequences."

V.

The District Court and District Judge in making to the jury the foregoing statements quoted from said charge, erred in the following particulars:

1. They deprived the defendants of a trial and determination of the case by a jury.

2. They substantially and practically determined for the jury that the defendants were guilty, and practically instructed the jury to return a verdict of guilty.

3. They incorrectly quoted and stated the evidence and claims of the defendants and thus misled the jury to a verdict of guilty.

4. They substantially and practically decided the case against the defendants and instructed and directed the jury to return a verdict of guilty against the defendants when the judge gave them the following instruction (part II of the quoted portions of the charge):

"As I had occasion to state in your presence in passing upon the motion of the defendants for an instructed verdict, *there is evidence before you which is*

sufficient in its legal tendency, that is sufficient as a matter of law, *to sustain the government's theory;* but whether it is such as to satisfy you of its truth is a question wholly for your consideration and determination, as I shall more particularly instruct you." As all the material evidence was in print, and undisputed, the only question being good faith of the defendants, the force and effect of this instruction against the defendants cannot be doubted.

5. They again substantially and practically decide the case against the defendants in immediately thereafter (part II of the quoted portions of the charge) giving the following instructions:

"I should, however, notice the aspects of *some of the facts which the evidence tends to establish, the tendencies of which might not otherwise be readily apprehended by the minds of laymen like yourselves,* that is, men not versed in the law", and then he proceeds to pick out and emphasize against the defendants the portions of the evidence hereinafter specified.

6. The judge was mistaken when he said, (part III of quoted portions of charge), "among other documents which the evidence tends to show were put out and furnished by the defendants through the American Patriots and those in its employ to people who came to its office was a so-called legal opinion admitted to have been prepared by the defendant O'Connell, a copy of which has been put in evidence."

This is entirely incorrect and there is no evidence to sustain it in the following particulars:

A. It was not put out and furnished by the defendants directly or indirectly to anyone.

B. It was not admitted to have been prepared by the defendant O'Connell. The uncontradicted evidence shows that the Government's witness Mengedoth found

it August 1, 1917, in an uncompleted state on a desk in Mr. O'Connell's office, or the adjoining office and picked it up, put it in his pocket, took it home with him, did not show it to anybody, and afterwards returned it to Mr. O'Connell and it was produced in court on request, by Mr. O'Connell, in the same uncompleted state. (Tr. pp. 35, 36, fols. 60, 61.) The answers quoted by said judge were entirely changed thereafter.

7. He was also mistaken when he said (in part III of quoted portions of his charge): "And it is not the law, as contended at the trial by the defendants, that if a man reports for service in obedience to the notice to appear, he then loses any right to resort to the civil courts to test the validity of his compulsory service." The defendants did not make any such contention at the trial, or at any other time, but did contend that if the person took the oath and signed the roll he was then in the military service and subject to military law as an enlisted soldier, and could not appeal to the civil courts to test the constitutionality of the draft act, and if he wanted to test the constitutionality of the draft act in the civil courts he must not take the oath or sign the roll as such a soldier. (Tr. p. 73, fol. 119.) Habeas corpus was not the best remedy as was shown by said district judge at this trial in the presence of the same jury in making the following statements and taking the following action in the case of H. H. Mettler:

> "The Court: In the matter of the petition of Henry H. Mettler for a writ of Habeas Corpus, presented on Friday last, I have given the petition examination in the light of the provisions of the Constitution, the main contention being that the petitioner is held in custody by reason of proceedings taken under the Selective Service Law and that law is an antagonism to the Constitution

of the United States. I have carefully examined the provisions of the Constitution and the provisions of this law, in the light of it, and I am entirely satisfied that there is nothing within the provisions of this law which would render it obnoxious to any provision of the Constitution which fell under my observation. While it is not stated in the petition it has been sufficiently manifested at the present trial that the real objection to this act is that it contemplates sending troops abroad; for the purposes of the present war for their participation therein; in the first place, there is nothing in this law which in any wise in itself could be regarded as having that purpose in view, but, in the next place, if there be contemplated such action, and doubtless there is, because we cannot ignore facts which are of public cognizance, in my view there is absolutely nothing in the Constitution which would inhibit such a disposition of our troops in a time of necessity and for the purpose of carrying on the war in which we are engaged in such manner and by such means as will best conduce to its speedy and its successful conclusion.

"The petition for a writ of habeas corpus will accordingly be denied.

"Mr. O'Connell: We will take an appeal. Will your Honor fix the bail?

"The Court: I will consider that later; you can make an application. Where is the defendant now?

"Mr. O'Connell: He is up in the Stockton jail.

"Mr. Preston: As I understand it the defendant is in charge of the military already.

"Mr. O'Connell: He is in charge of the sheriff in the Stockton jail.

"The Court: He may be in the immediate custody of the Sheriff of San Joaquin County, but nevertheless his custody may be under the direction of the military authorities.

"Mr. Preston: I am informed, unless Mr. O'Connell has information to the contrary, that this prisoner is at Alcatraz, having been taken there yesterday or the day before.

"Mr. O'Connell: That is news to me.

"The Court: You can examine into the situation and present your application at a future time.

"Mr. O'Connell: May I present an amended petition, if your Honor please, if the facts justify it, so that the entire question will go up?

"The Court: The order will simply be that this petition be denied. You have a right to present any further petition that you see fit."

8. Said judge erred in stating to the jury that the quoted portions of said opinion: "The advice given in this opinion was therefore erroneous and misleading as not stating the law." The advice was not erroneous or misleading. It did state the law.

9. He selected and quoted from only certain small portions of said unfinished legal opinion on the constitutionality and effect of the Draft Act given in the form of questions and answers thereto, which portions he told the jury "do not state the law" and told the jury that the legal opinion and conclusions were unsound and that the draft act and rules and regulations were constitutional and valid and that "the advice given in this opinion was therefore erroneous and misleading as not stating the law", and that the jury had the "right in connection with all other circumstances to consider its erroneous character in determ-

ining whether it was given in good faith and for an honest purpose as is the claim made here, or was intended as part of a scheme to obstruct the enforcement of this law"; (part III of the quoted portions of the charge).

10. He stated (in part IV of the quoted portions of the charge) that "Large numbers" of "the claim of exemption were furnished to those who joined the American Patriots for their use before those boards", and that a "considerable number were tendered by young men who objected to the service", whereas as a matter of evidence and fact no more than 3 to 6 were presented; and when the discrepancy was called to his attention he declared to the jury that said claim of exemption was "an illegal document", and that "3 was a considerable number of an illegal document", and did not quote all of said document.

11. He also stated (part IV of the quoted portions of the charge) to the jury that the portion of the sentence which he quoted from the claim of exemption "was well calculated to create antagonism in the minds of those to whom it was furnished, to the law in question and induce them to oppose and refrain from conforming to its requirements and thereby bring about obstruction to its enforcement." He thus usurped the province of the jury, and told them the defendants were guilty and in connection with the other instructions and rulings during the trial appearing of record determined the case for the jury and practically directed a verdict of guilty.

12. He quoted but a small portion of one sentence of the said claim of exemption filed by the defendant Carey and others with the draft board setting up the unconstitutionality of the draft act as one of the grounds of his claim of exemption and unduly and unfairly emphasized that portion and substantially told

the jury it was sufficient evidence to convict of a purpose of obstructing the enforcement of the draft act, although if he quoted it in full it would show that the whole document was innocent and legal, but he did not give the whole document to the jury. (Part IV of the quoted portion of Judge's charge.)

13. He quoted only a small portion of the "membership circular" soliciting membership and stated that "it has a distinct tendency to engender opposition and resentment against the act in question and to induce refusal to comply with its requirements", and that the jury had the right to so consider it, which was a substantial and practical direction to return a verdict of guilty, (part "V" of the quoted portions of the charge.)

14. He erred in instructing the jury that the part so quoted had such "a distinct tendency," as it had no such tendency, as will appear from reading said quoted part, being as follows:

> "The American Revolution was fought, won, and the Republic established by Sons of Liberty an organized minority, in spite of the opposition of Tories, grafters, and grovellers, before wealth and office in those days, assisted as they were by the purchased press, suppressing the truth and publishing lies, for the purpose of scaring or humbugging the people. At present all that these American heroes fought for and won is in extreme danger of being lost. To save the Republic we have therefore organized the American Patriots."

15. He quoted from (part VI of the quoted portions of the charge) and unduly emphasized against all the defendants, a portion of a speech delivered at a public meeting July 3, 1917, by the defendant Herman B. Smith, which on the undisputed evidence, was at least

9 days before the agreement to form the American Patriots, and at least 9 days before there was any understanding, or any possible conspiracy, or agreement, or even communication between the said Smith and any of the other defendants, and with which speech, or meeting, none of the other defendants had been in any way whatever connected by the evidence or otherwise, and of which they had no knowledge until said evidence was produced in this trial.

16. The said meeting was held under the protection of the Constitution and laws of the State of California for the purpose of considering and adopting a petition to Congress for a redress of grievances and the repeal of certain laws and the said speech was in support of said petition which had been previously presented to that meeting, at which meeting none of the other defendants were present according to the Government's uncontradicted evidence.

17. The said judge erroneously stated that the jury had the right to consider it in determining the purpose of the defendants, and substantially and practically instructed them that they could convict the defendants thereon, his comments thereon being as follows:

> "This language if not distinctly seditious in character, was at least outside and beyond any such purpose as claimed by the defendants as the objects they had in view, and its natural and only tendency would be to inflame the minds of the public and sway it against the act in question and induce them to oppose and obstruct its enforcement. It was therefore wholly unjustified for any innocent purpose and was not protected by the right of free speech or otherwise, and you have the right to so consider it in determining the defendant's purpose."

18. He selected and disconnected from the speech of Daniel O'Connell at Lodi, Cal., on August 4, 1917, certain words and parts of sentences, and parts of some of the answers to the questions suddenly propounded to Daniel O'Connell then and there, and never quoted or mentioned the other portions of said speech, or the whole of the answers, or the questions to which they were answers, and unduly emphasized those words, sentences and parts so quoted, and substantially directed the jury that they were sufficient to convict all the defendants; (part "VII" of quoted portions of charge.)

19. In said instruction part "VII" of the quoted portions of the charge, he picked out and stated to the jury certain portions of the testimony of one of the government witnesses, a newspaper reporter, present at said meeting in Lodi, and unduly and unfairly emphasized the testimony of said witness, but did not pick out or state any of the other portions of the testimony of the same witness which qualified and gave a different meaning to those parts which he did pick out and state.

20. He did not state any portion of the testimony of several other witnesses for the Government who were present at said meeting and gave a different report and testimony of what was said and done there, which was more favorable to the defendants than that so picked out and quoted.

21. In the other portions of the testimony of the witness (Tr. pp. 57, 58, 59, fols. 94-98), so quoted by said Judge in his charge, it appeared that the defendant O'Connell explained that "if they wanted to test the constitutionality of the draft act they could not sign or take the oath as that would put them in the military service under military law and they could not apply to the civil courts for a writ of habeas corpus for the pur-

pose of testing." He also said that "some of the boys would come back, but who knows." He also said that he would bring the cases individually and collectively to the Supreme Court of the United States and secure a decision from that Court on the constitutionality of the draft act within three or four months, and "when it was said about a large number of cases Mr. O'Connell said that the question was being raised all over the country, in New York and other places, and that those would all go to Washington, and probably would be argued together by the best counsel in the United States." He also mentioned the opinions of Daniel Webster and Hannis Taylor that the troops could not be taken out of the country and that this was not a war of defense and the troops could not be taken out of the country. A fair reading of the testimoney of said quoted witness shows that the statement about the average length of life of the men in the trenches was in the impromptu answer to the question: "Who do you want to win the war?" The answer appearing from said testimony to have been (pp. 58-59) in substance as follows: "What do you mean by winning the war? I cannot see how anybody can win; that there never was a good war and never was a bad peace, and if they went on piling up all our young men dead, he did not consider that winning. (Fol. 97.) Every intelligent person here knows that these young fellows who go across the ocean will never come back. We know that the average life in the trenches is about 48 hours. I wonder if it is 48 hours with those machine guns on both sides throwing bullets so fast that when a man throws up his head he is gone, and when they stick up their bodies to run across 'No Man's Land' to the other trenches, you wonder how they even last 48 hours in the trenches. Everyone of these young

men who go will never come back—there may be some who may, but we don't know."

22. The said Judge substantially and practically instructed the jury that if they found those disconnected portions of that testimony so quoted by him, true, without mentioning the other portions of the testimony, the defendants were guilty and that the jury had the right to so find them guilty. (Part VII of the quoted portion of the charge.)

23. The said Judge in said instructions as quoted, told the jury that they could convict anyone of the defendants, and acquit all the others, without explaining to the jury how one person could conspire with himself.

24. In said quoted portions of the charge said Judge erroneously instructed the jury as follows: "It makes no difference how honest their views may be; as I have said to you, if they have done acts which under the law would result in the obstructing of this statute, and there was a combination between them for the purpose, then they are guilty."

25. The said Judge erroneously instructed the jury that the existence of the alleged conspiracy might be shown by circumstantial evidence, and refused to instruct the jury that where the acts are open, then the existence of the conspiracy can not be established by inference, but must be established directly.

26. The said Judge refused to instruct the jury that if the result of the act is an incident, and not a necessary consequence, then he is not responsible for the incidental result, and it must be the necessary and natural consequence of what he does. (Part XI of the quoted portions of the charge.)

27. The said District Judge erred in stating (part VII of quoted portion of charge), in relation to speech

of Daniel O'Connell at Lodi, Cal., the following: "If you find this evidence to be true, the advice thus given and the declarations made were not within the right of Mr. O'Connell in any purpose he may have had to test this law, nor to secure aid with which to make such test, nor by any right of free speech in connection with such object, and you have a right to so consider it in determining the real purpose for which the language was uttered." The parts of said speech were those set forth in the foregoing subdivisions 17 to 21 of this division IV of this amended assignment of errors, and the said statement of said District Judge is incorrect as they were within the rights of Mr. O'Connell, and they are incorrect in fact as they are not a full or correct statement of what was said as has been shown hereinbefore.

VI.

REFUSAL TO DIRECT VERDICT AT CLOSE OF CASE. NO EVIDENCE OF ANY ALLEGED CONSPIRACY.

Said District Court erred in denying defendants' motion for an instructed verdict of "not guilty" at the close of all the evidence in the case, because:

1. There was no evidence whatever of any of the conspiracies alleged in either count of the indictment. There was no evidence of any agreement, understanding, or arrangement or meeting of minds, or of any kind, in any way, shape, or manner, on any subject, or proposition other than the organization of the corporation called the "American Patriots", and the purposes for which that corporation was organized; and the first meeting, or understanding, or communication of any kind or nature, whatever, on that subject, or any other, was on said July 11, 1917, when the three de-

fendants, Daniel O'Connell, David J. Smith and Herman B. Smith met with others not defendants, in a social meeting, and as a result of discussion, agreed to form the American Patriots. There was no evidence whatever of any other agreement or conspiracy.

2. There was no evidence whatever of any communication between any of the defendants, or with any of the defendants on any subject prior to that evening of July 11, 1917, except that the defendant Herman B. Smith once about July 1, 1917, requested the defendant Daniel O'Connell to address a meeting on the evening of July 3, 1917, and Mr. O'Connell declined saying that he was going to be out of town that evening.

3. The organization of the American Patriots, the purposes of which are undisputed, and recorded, and the issue of its charter was a conclusive judgment of the state of California, that the purposes were lawful, and such incorporation, or corporation, could not be made the basis of a charge of criminal conspiracy on the part of any of its members. The only things that could be done in pursuance of said corporation and charter must necessarily be lawful.

4. All the objects and purposes of said corporation are the following:

"To defend, maintain and enforce the letter and spirit of each and every provision of the Constitution of the United States and the Constitution of California.

"To challenge and test in the courts each and every Act of Congress and the executive department which violates said Constitution.

"To test the constitutionality of the so-called draft or conscription act now sought to be enforced.

"To test the constitutionality of every act of the

executive and legislative departments forcing any person in the land or naval forces of the United States to render military services in Europe.

"To amend the Constitution of the United States so that war can never be declared except by vote of at least two-thirds of the registered voters of the United States.

"To amend the Constitution of the United States so as to incorporate therein the initiative, referendum and recall substantially as contained in the Constitution of California.

"Neither profit, nor profit sharing, nor dividends, nor dividend sharing, nor any financial gain, to any of the members, or otherwise, shall ever be any of the objects of this corporation."

5. Near the close of the Government's evidence, and after the organization, charter, objects, and purposes of said corporation was in evidence the District Judge in admitting the demurrers and records in the cases of U. S. vs. Gambo, and U. S. vs. Cohen, in evidence so ruled and stated; his ruling being as follows:

> "The Court: Mr. O'Connell here is the situation: Your defense as I understand it—the defense of the defendant—is that being honestly of the opinion that this act was unconstitutional that you took steps to organize this corporation, the American Patriots, by reason of the fact that you felt you were entitled to have an aggregation contribute because it was too onerous upon any one man; that you accordingly gathered together in that form with the genuine and honest purpose of testing this law, the constitutionality of it, gathered together these people. Now of course, there is no question but what either an individual as I shall be called upon to advise the jury—has the

right in good faith to test any law that affects his rights, his liberty, his life—and as you have requested in your proposed instructions; but the prosecution certainly has the right to show that that was not the real object of this corporation at all; they have the right to show that the methods pursued were not in harmony with any such purpose at all; they have the right to show that this corporation, not only through its individual members, made declarations which were at variance with any such purpose, but issued propaganda which was of a nature to be against such a purpose; that is, I mean a purpose that went beyond any mere desire to test the act and to deter and induce others to refuse to subscribe to the act. That is all they are trying to do. That is perfectly proper. *If it is found by this jury that the purposes of this corporation and the acts done under its organization were as you say, and not as the prosecution claims then, of course, you cannot be convicted;* on the other hand, if it appears that the corporation was used merely as a cloak through which to reach a large number of people with a course of solicitation and representation and propaganda which would be in its nature calculated to induce others not to enlist, or not to subscribe to the draft act, then the jury would have the right to find that that was the purpose of the corportion, *instead of the genuine one of testing the constitutionality of the act. That is the whole question.* And this is directed to that. I want you to understand the reason of my rulings as we go along."

6. If there were any *unlawful* things said, or written, or circulated, or done, they *could not be in pursuance of the objects and purposes of that corporation,*

or in carrying out *its* objects and purposes, as necessarily only lawful acts could be done in carrying out the objects and purposes of such a lawfully authorized and organized corporation. Such acts must necessarily be in pursuance of, or carrying out, the objects of *some other* conspiracy; or be merely apart from *any* conspiracy and offensive in themselves only.

7. But there was no evidence whatever of any other "conspiracy or agreement", and each count is *founded* on a charge of conspiracy, and not on the acts themselves, and therefore *each charge of criminal conspiracy falls,* "as conspiracy is the crime and single, no matter how diverse its objects", and the case falls with the failure to prove the alleged conspiracies.

OVERT ACTS NOT CRIMES, AND NOT UNLAWFUL.

8. The first act alleged and proved in point of time was the organizing of that corporation July 14, 1917, which we have seen was innocent and lawful. The second is that of the defendant Carey on August 4, 1917, filing a claim of exemption setting up his parents' dependence, and the unconstitutionality of the draft act, and his readiness and willingness to fight for the United States at any time, but that "I am certain that notwithstanding all the humbug and lies published in the newspapers and other publications of the world, there is not and cannot be the slightest danger to the United States, as this war is simply a war of aggression, conquest, and greed on the part of England; and England and her agents have secured a vote of Congress assisting them in this war, which vote was in violation of the constitution and will be reconsidered by the next Congress who will have full power, and express direction from the people." (Tr. p. 5, fol. 9.) The third overt act charged was that on August

4, 1917, Daniel O'Connell went from San Francisco, Cal., to Lodi, Cal. The fourth overt act charged was that on or about August 1, 1917, Daniel O'Connell prepared and caused to be distributed a document entitled "Legal Opinion and Advice on the Conscription Law to American Patriots." These acts as charged are in themselves innocent and lawful and we must resort to the evidence to see if there was any evidence to prove the crimes charged, or if they were criminal, or if they show any *other* conspiracy.

9. There was *absolutely no evidence whatever of any intent to obstruct* enlistment or recruiting or the operation of the draft act. The *only intent* of which there was any evidence was to test the constitutionality of the draft act by carrying one or many cases direct to the Supreme Court of the United States, which Court would decide the point within 3 or 4 months, and to raise the money to pay counsel and other expenses of that testing by organizing this corporation, American Patriots, and induce persons to pay $5.00 to join and $1 00 a month to pay these expenses. Incidentally there were things said against England by Irishmen and the descendants of Irishmen, *but was for the purpose of securing members for, and contributions to, the American Patriots, not with the intent to obstruct enlistment, or recruiting, or the operations of the draft act.*

10. There was no evidence whatever that any of the defendants ever advised, or attempted to induce or persuade any person not to register, or not to report for the physical examination, or not to take the physical examination, or not to obey any order or regulation or duty, or evade any, under the draft act. On the contrary it was overwhelmingly proved by all the evidence for the Government and defense, that all were specifically advised and directed to register, take

the physical examination, and follow out every step of the law, and comply with every requirement of the law, but at the last step if they wanted to contest the constitutionality of the draft act, they must not sign the roll or take the oath as that put them in the military service as an enlisted soldier and subject only to military law and courts and could not appeal to the civil courts to test the constitutionality of the draft act.

11. *The undisputed evidence* was that the defendant Daniel O'Connell had repeatedly said in public speeches, and to the American Patriots that it was the duty of everybody who believed the draft act was constitutional to enlist and that all those persons, and newspapermen, and magazine writers, who were clamoring for war should be forced to go to war, and that it was his opinion and belief as a lawyer that the Selective Service Act was unconstitutional when used to compel the men to fight in Europe, which was not and could not be a war of defense as referred to in the Constitution of the United States; that it would cost more to test its constitutionality than a few men could afford to pay, being at least $5,000 and the best means of raising the necessary money co-operatively was by organizing a corporation for that purpose, and the American Patriots was organized. The "circular letters", the "film productions", the wagon on the street, all requested people to join the American Patriots and made no other request. The attacks on "John Bull" and England and the pictures of patriotic scenes, and of acknowledged American Patriots and Presidents were all for the plain purpose of arousing a distinct American patriotism and securing more members for the American Patriots. There was not a thing said, written, or done, for any other purpose, or with any other intent. *There was not a particle of evidence of any kind or nature to show any other purpose*

or intent. There was no evidence whatever of any intent or purpose to obstruct recruiting, or enlisting, or the operations of the draft act.

12. There was no evidence that any person refused to enlist, or be recruited, or be drafted, or obey any orders under the Selective Service Act, or its rules and regulations in consequence, of or as a result of, anything that any of the defendants did, or said, or wrote, or caused to be written, or printed, or circulated. The uncontradicted evidence was that all the persons liable to the service or draft, who became members of the American Patriots, long before they ever heard of the American Patriots, or any of the defendants, of the determined opinion from what they had read, and heard from U. S. Senators, and other public men, that the Selective Service Act was unconstitutional, and were determined to test its constitutionality in the courts and joined the American Patriots as the best means of testing it; and there was no evidence whatever that any other persons were influenced in any way, shape or manner.

13. The undisputed evidence was that each and all of said persons were thoroughly and honestly convinced that said Selective Service Act was unconstitutional, and that they were testing it solely because of that honest opinion and belief, and each and all declared that if the law was declared constitutional they would immediately enlist; and that they were ready to enter the service to fight in the United States, but objected to fighting in Europe until the Supreme Court of the United States finally decided that it was constitutional.

14. *This want of evidence* forced the district judge to repeatedly change his rulings and during the latter part of the trial to rule in the presence of the jury and later instruct the jury that it did not make any dif-

ference what the intent of the defendants might be or how honest and good their views or motives were, yet if the defendants said or did "anything which would be calculated to bring about and produce a state of mind in the public with reference to this act which would be calculated to result *in any one* subject to its provisions deterred from acquiescing in its requirements subscribed to them would be pertinent", and also that the defendants would be guilty, as the only possible excuse on the evidence for not directing a verdict of not guilty.

15. In the Espionage Act, or the Selective Service Act, or any other Act of Cngress is so construed as to make the defendants guilty of a crime on this evidence, then such Acts of Congress plainly violate the First Amendment of the Constitution of the United States.

16. There was not a particle of evidence to show that any of the statements as to fitness or liability or anything else made by the defendant Carey and others in the claim of exemption were false, or that their opinions were false, or that they either were unfounded.

17. There was not a particle of evidence that the statements oral and written, and also the actions of the defendants were not made in good faith, and in the honest belief that they were all tending to the accomplishment only of the recorded purposes of the American Patriots.

18. The said statements made in said claim of exemption, on the wagon "John Bull is ruling and ruining us, what are you doing about it? Join the American Patriots" were plainly a patriotic warning of the danger of the control or influence of the government of England in this country, and to unite

to drive that influence out before it would be too late. Their ancestry was proof of the honesty of that belief.

19. Everything that the defendants said and did as shown by the evidence, was plainly protected by the First Amendment to the Constitution of the United States, and Section 37 of the United States Penal Code, and exclusively within the jurisdiction of the State of California, and protected by Sections 1, 2, 9, 10, of Article I of the Constitution of the State of California, and other laws of that state and the Espionage Act, Selective Service Act, or any other Act of Congress making a crime what was so said and done by the defendants according to the evidence in this case were unconstitutional, null and void.

VII.

REFUSAL TO QUASH THE INDICTMENT AND DIRECT A VERDICT OF ACQUITTAL.

1. The District Court erred in not granting defendants' motion to quash the indictment and direct a verdict of not guilty at the close of the Government's evidence in that the Government had offered no evidence whatever to prove any of the conspiracies alleged in any of the counts of the indictment, nor any of the overt acts, nor any acts, done by any of the defendants in pursuance of any such conspiracy as alleged in any of the counts of the indictment. (Tr. pp. 94-99.)

2. The District Court erred in denying the motion of the defendants to instruct the jury to render a verdict of "not guilty" at the close of the Government's case, in that no evidence had been offered to prove any of the conspiracies alleged in either count of the indictment, or any of the overt acts alleged to have been

done in pursuance of said conspiracies, or any act done in pursuance of any alleged conspiracies, or of any crime committed against any law of the United States.

3. The District Court erred at the close of the Government's case, in refusing to rule that each and all of the acts of each and all of the defendants was done within the protection of the Constitution of the United States, and particularly the first amendment to said Constitution and the constitution and laws of the State of California, protecting free speech, free press, public assemblage and petition for redress of grievances and any act of Congress pretending to make any of said acts of the defendants a crime, would be, without authority and in violation of said Constitution of the United States, and null and void.

VIII.

ERRORS IN ADMISSION OF EVIDENCE FOR GOVERNMENT.

1. The District Court erred in admitting evidence of a conversation between the defendant E. R. Hoffman, and one William J. Mowry, in the absence of all the other defendants in August 1917, and before any evidence was offered by the Government to prove either, or any, of the conspiracies alleged in either count of the indictment. (Tr. p. 44, fol. 74.)

2. The District Court erred in admitting in evidence the dodger advertising a public meeting to be held in Oakland, Cal., July 2, and another meeting at Dreamland Rink in San Francisco, Cal., on July 3, 1917, at which latter meeting, the defendant Herman B. Smith presided, and none of the other defendants were to be speakers, and there was no evidence whatever that any of the other defendants were present,

and the evidence was that none of the other defendants were present at said meetings, and before any evidence had been offered of any of the conspiracies alleged in either count of the indictment and before any evidence had been offered of any communication direct or indirect between any of the defendants, or with any of the defendants or any evidence that the defendants were even acquainted with each other. (Tr. p. 47, fol. 78.)

3. The District Court erred in admitting in evidence the transcript and reading to the jury a reporter's transcript of remarks made by the defendant Herman B. Smith, as presiding officer at the said meeting of July 3, 1917, at which meeting none of the other defendants were present, and there was no evidence that they had anything whatever to do with said meeting or knew anything about it, and before there was offered any evidence by the government to prove any of the conspiracies alleged in either count of the indictment. (Tr. p. 47-48, fol. 79-80.)

4. The District Court erred in admitting in evidence the said remarks of the defendant Herman B. Smith at said meeting at the opening of which meeting there was read a petition to the Congress of the United States of America entitled, "Petition to the Congress of the United States of America. To the Honorable Congress. We, thousands of citizens in San Francisco in the United States, in Dreamland Rink, in San Francisco, upon the eve of the anniversary of the Declaration of Independence, July 3, 1917, in order to secure a redress of grievances, petition your Honorable body:" Thereafter specifying various grievances. (Tr. pp. 49-50, fols. 81-82.)

5. The District Court erred at the close of the government's case in not granting the motion of the defendants to strike out from the evidence the printed

copies of the Socialist Platform, known as document number five, sent direct from Chicago to the voters throughout the country belonging to the Socialist party, and called the majority report of the Socialist Platform, adopted April ....., 1917, (Tr. pp. 50-51-52-53, fols. 83-84-85-96), which document was delivered to each of the jurymen, and read to the jurymen, and which document had been taken from the hotel in which they were placed by said David J. Smith, and the secretary of the Socialist Party in San Francisco, acting for said Socialist Party, on June 2, 1917, and seized by the special agent of the department of justice June 2, 1917, and held in his custody thereafter. And which were not connected in any way with any of the other defendants, and which on the close of the Government's evidence, the defendants moved to strike out from the evidence, because they had not been connected in any way with the other defendants, (tr. pp. 88-89, fols. 143-144), to which motion the said District Judge answered as follows:

> "The Court: Mr. O'Connell, this charge is conspiracy to do what? To obstruct the execution of the so-called draft act. As I had occasion to remark this morning, obstruction means any method of procedure which might either directly or indirectly tend to an obstruction of the execution of the law; in other words, anything which would be calculated to bring about and produce a state of mind in the public with reference to this act which would be calculated to result in anyone subject to its provisions being deterred from acquiescing in its requirements, subscribing to them, would be a pertinent matter to go before the jury *as tending to show what the purpose of the defendants was in anything they did.* Now it is not at all essential that any means employed by any one

of the defendants if there was a conspiracy, which is for the jury to find, it is not at all material from what source any of the propaganda or means that might disseminate by defendants among the public for such purpose would come. It might be literature produced by an organization in Europe as to which the defendants so far as they were concerned had never had any knowledge as to its organization, much less being members of it, and yet if they availed themselves of the emanations from a source of that kind, which by reason of its character was calculated to further their ends, if they were using it and disseminating it, *or were on the point of doing so,* it is entirely competent as evidence in view of the nature of this charge. *The evidence in this case it seems to me does sufficiently disclose this to enable it to go to the jury.* I do not pass upon the weight of the evidence at all, I pass upon its admissibility, its relevance to the issue, and I am bound to leave the weight that it shall be accorded in the great sum of evidence, to the jury; but it seems to me that under the evidence in this case, if there be found, and I think there was read matter from this exhibit which, as I suggested a moment ago might be, or would be, calculated to influence the minds of people to whom it was distributed, which would induce them, if responsible to this draft act, to refuse to conform to it and so far as lay in their power to resist its execution, I don't see why it would not be admissible.

"Mr. O'Connell: *If it is connected,* if your Honor please.

"The Court: *That is just what I have passed upon. I think the evidence here is sufficient to connect it.* One of the defendants it was very

clearly shown,—I am talking about what the evidence tends to show, because the jury will find out whether it is shown, but if it—not shown to their satisfaction that he had nothing to do with it, then of course they will disregard it; but for the purposes of a motion of this kind, if there is evidence which tends to show that one of the defendants *during the existence of the conspiracy,* if the jury shall find that one was in existence, had to do with the literature of this kind for the purpose of aiding or assisting in its distribution, *or independently for himself,* distributed it and it was of a character that might further the purposes alleged to have been the object of the conspiracy, it is perfectly competent.

"Mr. O'Connell. *My objection of course, was that it had not been connected.*

"The Court: Just recall the evidence on the subject. The hotel keeper testified to facts which if the jury believes it, would be sufficient to connect the defendant David J. Smith with this literature. *That makes it competent to go before the jury for their consideration.* I will overrule that motion and give you the benefit of an exception."

6. The District Court erred at the close of the government's case, in refusing to strike out all the evidence of the speech of Herman B. Smith, on July 3, 1917, at Dreamland Rink, which meeting was started with a petition to congress on certain grievances on repeal of the conscription law, and anything done in that meeting was under the protection of the Constitution and laws of the United States, and under the protection of the constitution and laws of the state of California. It was within the exclusive jurisdiction

of the state of California, and its laws protecting public meetings, free speech, and free press. Those subjects being prohibited from any legislation on the part of congress. On which motion the Court ruled as follows:

"The Court: It does not make a particle of difference whether what has been shown here to have been said by Herman B. Smith on that occasion was expressly authorized by the laws of California. The question here is and the only question is whether or not those utterances were in keeping with what the government claims to have been a fact here, a propaganda of a method or procedure and utterance with reference to this law which was calculated to, and which was intended to, obstruct its execution. It might well be or might possibly be something that would be found in the statute of the States or in the constitution of the state. If the use made of it by one engaged in such an enterprise was such as to give it a place in the sum and substance of evidence tending to show that there was being carried on a purpose to obstruct a federal statute, the fact that it was a part of the law of the state would not in any way shape or manner affect its admissibility. The fact that *they* were protected in that meeting from any prosecution by the state, could not to any extent affect the question of either the admissibility of the evidence or its effect here when considered for the purpose of a prosecution of this kind. Doesn't that appeal to you as such?

"Mr. O'Connell: To be frank with your Honor, it does not.

"The Court: The fact is that was not a fair question because it is directly in accord with your theory. However, that is the view that I enter-

tain. The motion to strike out that evidence will have to be denied." (Tr. p. 90, fol. 146.)

7. The District Court erred in denying the motion of defendants to strike out the evidence of the dodger which was printed and distributed advertising the meeting of July 3, 1917, in the Dreamland Rink, as there was no evidence connecting the dodger, or the meeting, with any of the defendants other than Herman B. Smith, and there was no evidence offered to prove that there had been any conspiracy of any kind between any of the defendants at that time, or prior thereto, or that there had been any communications whatever direct or indirect, between any of the defendants at that time, or prior thereto. (Tr. pp. 88-89-90-91, fol. 142-147.)

8. The District Court erred in admitting in evidence, and reading to the jury the demurrers and other proceedings in the actions of the United States against Gambo, and United States against Cohen, decided in said District Court of the United States, June 23, 1917, of which none of the defendants, except the defendant Daniel O'Connell, had any knowledge or notice. (Tr. pp. 74 to 76, fols. 121 to 124.)

9. The District Court erred in making the statements hereinafter quoted in the presence of the jury, during the cross examination of the defendant Thomas Carey, by United States Attorney, John W. Preston, at said trial as set forth on pages 161-166, fols. 260-261, of the printed transcript as follows:

"Q. Why did you slander the country by putting in these things here? (Pointing to the last sentence in the O'Connell claim of exemption, which reads as follows: 'Later on, I shall present in my affidavit, in support of my claim of exemption, a more detailed statement of the facts and

particulars upon which the foregoing claim of exemption is hereby made, and for the purpose of laying the foundation for testing all the said rules and regulations, orders, acts, and laws, I am filing with you at this time the foregoing claim of exemption, and whenever there is the slightest danger to the United States or the Constitution of the United States no one will respond quicker or fight better or longer than I will and that without any conscript or draft law, but I am certain that notwithstanding all the humbug and lies published in the newspapers and other publications of the world, there is not, and cannot be, the slightest danger to the United States, as this war is simply a war of aggression, conquest, and greed on the part of England and England and her agents have secured a vote of Congress assisting them in this war, which vote was in violation of the Constitution, and will be reconsidered by the next Congress, who will have full power and express directions from the people'!

"Mr. O'Connell: We do not admit that he slandered the country.

"Mr. Preston: I say it is slander, and I have a right to characterize it as slander.

"The Court: I will have to tell the jury it is unnecessary to any claim of legal right.

"Mr. O'Connell: We shall except to your Honor's remarks.

"The Court: I shall have to instruct the jury that that language is outside any legal right.

"Mr. O'Connell: We ask to save an exception to your Honor's remarks."

IX.

ERRORS EXCLUDING EVIDENCE OF DEFENSE.

1. The District Court erred in excluding the evidence of good faith and lawful intentions and purposes offered by the defendants to meet the claim and evidence of the government that the defendants were not acting in good faith in testing the constitutionality of the draft act, but had the criminal intent and purpose to obstruct enlistment, recruiting, and the operation of the draft act and for which purpose the Court against the objections of the defendants, admitted certain alleged evidence of bad faith and such criminal intent on the part of said defendants, and the Judge of said District Court answering an objection of defendants to the admission of the records in the case of United States against Gambo, and United States against Cohen, decided in that Court in June, 1917, and referred to on page 74 folio 121 of the printed transcript of this case, spoke as follows:

> "The Court: Mr. O'Connell, here is the situation: Your defense, as I understand it—the defense of the defendants—is that being honestly of the opinion that this act was unconstitutional, that you took steps to organize this corporation, the American Patriots, by reason of the fact that you felt you were entitled to have an aggregation contribute because it was too onerous upon any one man; that you accordingly gathered together in that form, with the genuine and honest purpose of testing this law, the constitutionality of it, gathered together these people. Now, of course, there is no question but what either an individual as I shall be called upon to advise the jury—has the right in good faith to test any law that affects

his rights, his liberty, his life—and as you have requested in your proposed instructions; *but the prosecution certainly has the right to show that that was not the real object of this corporation at all; they have a right to show that the methods pursued were not in harmony with any such purpose at all;* they have a right to show that this corporation, not only through its individual members, made declarations which *were at variance with any such purpose,* but issued propaganda which was *of a nature to be against any such a purpose;* that is, I mean a purpose that *went beyond any mere desire to test the act* and to deter and induce others to refuse to subscribe to the act. *That is all they are trying to do. That is perfectly proper. If it is found by this jury that the purpose of this corporation and the acts done under its organization were as you say and not as the prosecution claims then, of course, you cannot be convicted;* on the other hand, if it appears that the corporation was used *merely as a cloak* through which to reach a large number of people with a course of solicitation and representation and propaganda which would be in its nature calculated to induce others not to enlist or not to subscribe to the draft act, then the jury would have the right to find that that was the purpose of the corporation, *instead of the genuine one of testing the constitutionality of the act. That is the whole question. And this is directed to that.* I want you to understand the reason of my rulings as we go along."

Thereafter in his charge to the jury, said Judge of said District Court used the following language: "Now, *the theory* upon which the Government's case proceeds is, in substance that the defendants have

transgressed the principles I have stated and have violated the law by deliberately and intentionally entering into an unlawful combination or association to thwart, interfere with, and obstruct the carrying out and enforcement of the Selective Draft Act by a course of conduct consisting of a series of acts not only intended but calculated to accomplish this unlawful purpose; *that the organization of the corporation called the American Patriots was not had in good faith with any genuine purpose of testing this law,* but was intended to be used merely as a means through which to secure funds for the use and benefit of those organizing it and with which to conduct a propaganda against the act, with the intent to hamper and defeat its execution and to use the corporation as a mask or cloak for their operations, under the mistaken idea that thereby the individual members will be shielded from responsibility for their acts; that in pursuance of this purpose the defendants and others inspired by them, issued and distributed pamphlets, circulars, advertisements on wagons, legal opinions and other literature, made public speeches and film presentations, and gave private advice to individuals, all of which was of a character to render it unlawful, and was designed and intended to inflame the minds of the people, and particularly those subject and eligible for military service against the propriety and validity of this act and to arouse active opposition thereto and thereby persuade and induce them to refrain from enlisting in the military service or complying with the compulsory requirements of the act, and thereby to obstruct and interfere with its execution and enforcement. *If you find this theory of the Government to be sustained by the evidence, then it will be your unquestioned duty to find the defendants guilty.*"

In other parts of his charge said Judge also cited

and emphasized certain evidence *claiming that it showed want of good faith and criminal intent upon the part of the defendants.* (Parts I and II in Motion for Certiorari; Tr. pp. 88 to 95.)

Said Judge and the United States Attorney frequently during the trial made similar statements, *that want of good faith as showing criminal intent* was one of the issues in the case (Tr. pp. 88 to 95), and said Judge admitted, alleged evidence claimed by the Government to have a tendency to prove such want of good faith, and such criminal intent, and that the defendants did not believe that the draft act was unconstitutional, and only set up that as a pretense, cloak and cover to obstruct enlistment, recruiting, and the operation of the draft act. To meet and disprove this claim and alleged evidence offered on the part of the Government, the defendants offered the evidence set forth in each of the following subdivisions and the District Court erred in rejecting each of said offers, and excluding said evidence as follows:

2. In excluding *as any evidence for the defendants* anything that Mr. O'Connell said after his arrest in any conversations whatever, but admitting anything said so far as it might be any evidence against him, not in his favor, or in favor of any of the defendants. (Tr. pp. 120-121, fols. 143-144.)

3. In excluding *as evidence for the defendants* any conversations or discussions Mr. O'Connell had on the constitutionality of the draft act at any time. (Tr. p. 125, fol. 201.)

4. In excluding *as evidence for the defendants* any conversations had about, or knowledge of, the unconstitutionality of the draft act of May 18, 1917, or the Act of 1863. (Tr. p. 140, fol. 224.)

5. In excluding *as evidence for the defendants,* evi-

dence that when the defendant David J. Smith had in his possession the Socialist platform which had been admitted in evidence, and delivered to, and read to, and by, the jury, he knew that Judge Rose of the United States District Court in Maryland, had made a decision that that literature was not seditious. (Tr. 149, fol. 437.)

The court had previously admitted this Socialist platform in evidence against the defendants, (Tr. p. 52, fol. 86) refused to strike it out (pp. 88, 89, 90, fol. 142, 146, 147), and afterwards declared it to be a seditious publication, and emphasized it in his charge to the jury as quoted in the motion for certiorari, and hereinbefore set forth.

6. In excluding *as evidence for the defendant,* evidence that the Socialist Party got out a petition for the repeal of the conscription law. (Tr. p. 160, fol. 154.)

7. In excluding *as evidence for the defendants,* evidence of the authority which the defendant Herman B. Smith had for concluding that the Socialist Platform was not seditious. (Tr. p. 161, fol. 255.)

8. In excluding *as evidence for the defendants,* evidence that the statement made by the defendant Thomas Carey, in his claim of exemption as set forth as one of the overt acts in each of the two counts of the indictment was *true,* and that he had good grounds for believing it to be true, and the grounds and evidence, and proof on which he based his belief and opinion, as stated in said claim of exemption, and quoted in said indictment, and which caused him to make that statement in good faith. (Tr. pp. 165-166, fols. 262-263.)

9. In excluding evidence of the conversation between Wal J. Tuska, a practicing lawyer in the Su-

preme Court of the United States, as well as all the courts of California, of his conversation with Daniel O'Connell about the constitutionality of the draft act in July, 1917, the said Wal J. Tuska having been retained by the said Daniel O'Connell, to assist in testing the constitutionality of said draft act before the Supreme Court of the United States. The said Daniel O'Connell not having been arrested before August 6, 1917. (Tr. p. 167, fol. 264.)

10. In excluding the conversation between the defendant Daniel O'Connell and Mr. Tuska, about taking proceedings to test the constitutionality of the draft act. (Tr. p. 167, fol. 264.)

11. In excluding evidence of any talk between the defendant Daniel O'Connell, and Mr. Tuska about Mr. Tuska being retained to assist Mr. O'Connell as senior counsel, or otherwise, in preparing a test case for the Supreme Court of the United States on the constitutionality of this draft act. (Tr. p. 167, fol. 264.)

12. In excluding evidence of any talk between the defendant Daniel O'Connell, and Mr. Tuska about the expenses of taking the case to the Supreme Court of the United States, and how the money to meet the expenses was to be raised. (Tr. p. 168, fol. 265.)

13. In excluding evidence of the talk between Mr. Tuska, and defendant Daniel O'Connell, about organizing a corporation for the purpose of raising the money to meet the expenses to carry the test case to the Supreme Court of the United States, which talk was had July, 1917. (Tr. p. 168, fol. 265.)

14. In excluding evidence of what the defendant Daniel O'Connell said on that subject, in that conversation. (Tr. p. 168, fol. 265.)

15. In excluding evidence that Mr. O'Connell told Mr. Tuska in that conversation that he was organizing

a corporation for the purpose of raising funds for the purpose of paying said Tuska, a retainer for preparing and presenting this case, and the expenses of testing the constitutionality of the draft act. (Tr. p. 169, fol. 266.)

16. In excluding evidence that Mr. Tuska afterwards inquired from defendant Daniel O'Connell how far he had gotten with the corporation in raising the money to pay the expenses of testing the constitutionality of this draft act in the Supreme Court of the United States, and refusing to allow any further questions to be asked on that subject. (Tr. p. 169, fol. 266.)

17. In excluding the evidence of the decision of Judge Rose of the United States District Court of Maryland, and his charge to the jury which upheld the right to criticize, condemn and seek to repeal, laws, and all efforts in that direction and was referred to by the defendant David J. Smith, and Herman B. Smith, and the other witnesses, as having been read by them, and which was wired all over the country on July 11, 1917, and on which some of the defendants based their opinions that the Socialist Platform was not seditious, and that they had the right to circulate it, and that neither its circulation nor the other acts they were charged with doing here, were in violation of the Espionage Act, or the draft act. (Tr. pp. 169-170, fol. 267.)

18. In excluding from the evidence the printed opinion of U. S. Attorney General Wickersham, filed in 1912, on the constitutionality of sending the military forces out of the country, his opinion being that it would be a violation of the Constitution of the United States to do so, which opinion on the undisputed evidence was read, and relied upon, by the defendants, and others, in their actions complained of in this case. (Tr. pp. 170-171, fol. 267-269.)

19. In excluding from the evidence the Pope's appeal to the United States government to intervene to make peace and stop the war at once, and the reply of the United States to the said appeal, which some of the defendants had read, and relied upon (Tr. p. 170, fol. 268), as further evidence of good faith of their statements and actions.

20. In excluding from the evidence the records of Congress, showing the debates in Congress on the draft act, and the speeches and claims of the Senators and Representatives that the draft act was unconstitutional, and which speeches some of the defendants testified that they had read and relied upon them, and upon which with other literature, they justified their opinion upon the unconstitutionality of the draft law. (Tr. pp. 170-171, fol. 268.)

21. In excluding from the evidence the argument of Daniel Webster in Congress, December 9, 1814, on the constitutionality of conscription for foreign service, especially in Canada; he claiming in the argument that a draft for such purpose was unconstitutional, and which speech all defendants testified that they had read, and relied upon it as one of the authorities in their opinion that the draft law was unconstitutional and which opinion was then approved and adopted by that Congress. (Tr. p. 171, fol. 267.)

22. In excluding from the evidence the speech of the President of the United States to Congress, dated Jan. 2, 1917, called the "Peace Without Victory" speech, which speech some of the defendants testified that they had read, and relied upon for their opinion and actions, (Tr. p. 171, fol. 269), and which speech declared that the President and people of the United States wanted the war to stop at once without any belligerent winning and save the further useless slaughter and destruction.

23. In excluding from the evidence the address of Hon. Hannis Taylor to the Congress of the United States, showing by argument and citation of authorities that the Selective Service Act was unconstitutional and void, which address had been produced by the witnesses with the said opinion of U. S. Attorney General Wickersham, as having been read by the witness and marked for identification in the case. (Tr. pp. 80, 81, fols. 129, 131; p. 171, fol. 269.)

24. The defendants offered in proof of the truth of the said statements made in the claim of exemption, and on the wagon, the published speech of Mr. Page, the U. S. Ambassador to England, at Southampton, England, October 18, 1913, in which he said:

"In spite of the great fusion of races and of the great contribution which other nations have made to the hundred millions of people across the sea, and to her incalculable wealth, the United States is yet English led and English ruled." Defendants also offered in evidence the Congressional Record containing the speeches of U. S. Senators and Representatives reciting the number of leading newspapers in the United States in which the controlling interest was purchased by the English government acting by and through Lord Northcliffe and an English syndicate in 1914, and the campaign made by them to obtain a declaration of war by the U. S. Congress against Germany.

But the said District Court ruled that all such evidence was immaterial and irrelevant and rejected all said offers, and thereby erred.

X.

RULINGS ON DEMURRER.

The District Court erred in its order overruling the demurrer to the indictment and to each count of the indictment in the following particulars:

1. The District Court erred in overruling the demurrer to the first count of the indictment in that the facts alleged in said count did not constitute a crime against any law of the United States.

2. The first count was insufficient and uncertain in that the overt acts alleged appeared to be all lawful acts and insufficient with the other allegations to constitute a crime against the United States.

3. The Espionage Act on which it is based violates the First Amendment to the Constitution of the United States and is void.

XI.

The District Court erred in overruling the demurrer to the second count of the indictment, because said second count being under the draft act of May 18, 1917, is uncertain and defective in the following particulars: (Tr. p. 14, fol. 23.)

1. It does not allege (pages 4, 5, fols. 7, 8) that any of the persons named or referred to therein, were "male citizens."

2. It *does not allege* that they were male persons, "not alien enemies who have declared their intentions to become citizens, between the ages of twenty-one and thirty, both inclusive," and therefore subject to enlistment or draft, as expressly stated in said act.

3. The allegation of "and who were liable for military service under the said Selective Service Law," *is a mere conclusion of law, and not a statement of any facts, and is to be disregarded.*

4. The second count is laid under section of the Selective Service Act, and is not alleged therein or in any of the counts or anywhere in the indictment that the defendants, or any of them, or any of the persons mentioned in the indictment, as conspiring to make "false statements and certificates as to their liability

and as to the liability of 6 persons (named in the indictment) for military service under the provisions of the Act of May 18, 1917, known as the Selective Service Law, and the regulations made by the President of the United States thereunder" were officers or persons "charged with the duty of carrying into effect any of the provisions of the Act, or the regulations made, or the directions given thereunder," as the only such officers or persons can commit the crime alleged in said second count under said Section 6.

5. It is not alleged in said second count, or in said indictment that said defendants, or any person named, or referred to, in said indictment, were required to or had any power or authority to make, or could make, any "statement or certificate as to liability for military service under the provisions of said Act, or any law or regulations" whatever, and therefore showing that defendants come within that section which applies only to persons "who in any manner, shall fail or neglect fully to perform *any duty required of him in the execution of this act.*"

Respectfully submitted

DANIEL O'CONNELL,
CARL J. F. WACKER, pro sese.

Supreme Court,
FILED
OCT 23
JAMES D. MAHER
Cl

No. [redacted]221

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1918.

DANIEL O'CONNELL, DAVID JAY SMITH, HERMAN B. SMITH, CARL J. F. WACHAR, THOMAS CAREY, and E. R. HOFFMAN,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR, DAVID JAY SMITH AND HERMAN B. SMITH.

DAVID JAY SMITH,
HERMAN B. SMITH,
Plaintiffs in Error,
in their own Behalf.

Subject Index.

	Pages
FOREWORD	1 - 3
STATEMENT OF THE CASE	3 - 7
SPECIFICATION OF ERRORS RELIED UPON	7 - 8
ARGUMENT	8 - 20
I. Overruling of Demurrer	8 - 9
II. Insufficiency of Evidence against Herman B. Smith	9 - 11
III. Insufficiency of Evidence against David Jay Smith	11 - 15
IV. Defective Verdict	15 - 17
V. Failure of Court to appoint counsel for David Jay Smith	17 - 20
CONCLUSION	20 - 22

Index to Citations.

	Pages
Const. U. S. Amend. 6	18
Corpus Juris, Vol. 16, page 822	18
Dietz v. State, 136 N. W. 166; Ann. Cas 1913 C 732	20
Garner v. State, 97 Ark. 63; 132 S. W. 1010; Ann. Cas 1912 C 1059	20
Horner v. U. S., 143 U. S. 570	9
Peo. v. Goldenson, 76 Cal. 328, 344	20
Ruling Case Law, Vol. 8, page 83	18
Rules of Court, Rule No. 35, sec. 1	3
Ryan, et al., v. U. S., 216 Fed. Rep. 13, 56	11, 13
Stephenson v State, 21 Ohio Cir. Ct. Rep. (N. S.) 287	20
U S. v. Britton, 108 U. S. 199, 204	21

No. 697

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1918.

DANIEL O'CONNELL, DAVID JAY SMITH, HERMAN B. SMITH, CARL J. F. WACHER, THOMAS CAREY, and E. R. HOFFMAN,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR, DAVID JAY SMITH AND HERMAN B. SMITH.

Foreword.

David Jay Smith and Herman B. Smith present their cause to this honorable court in a joint brief. The errors relied upon by these two plaintiffs in error are not in all respects the same. Owing to their very limited financial resources they have been compelled to thus consolidate their briefs but rest

content in the knowledge that this court will in its final consideration of the cause consider separately the facts pertaining to each of these plaintiffs in error.

Counsel for plaintiffs in error will from time to time call to the attention of the court errors appearing on the face of the record, but which were not objected to at the trial in the District Court and which are not set out in the assignment of errors as required by Rule 35 of this court. The reason for asking the court's indulgence in this behalf is this; plaintiffs in error attempted to try their own case—we used the word *attempted* advisedly. Had they been the only defendants on trial the trial judge could have adequately protected their rights, but such was not the case. Four other defendants were on trial, one of them an attorney who represented all of the defendants except the two who join in this brief. It was only natural that when the interests of the four defendants represented by counsel clashed with the interests of the two defendants not so represented the interests of the two not represented by counsel would suffer. It is idle to say that these two defendants should have accepted the offer of the court to appoint counsel to represent them—they were mere boys and were so designated by the court—David was 19 years of age and Herman had just passed 21 years. More will be said on this subject in another part of this brief. Sufficient facts have been pointed out to justify this court in applying the last portion

of Sec. 1, of Rule 35 of the Rules of Court, which reads as follows:

> * * * "but the court, at its option, may notice a plain error not assigned."

Statement of the Case.

The indictment alleges that the plaintiffs in error did, knowingly and feloniously conspire together to obstruct the recruiting service of the U. S., to persuade and induce sundry men to refuse to enlist in the U. S. military service and in various ways to obstruct the workings of the Select Service Law (Trans. pp. 2, 3, 4, 5, 6). The indictment also sets forth several overt acts on the part of several of the plaintiffs in error committed in furtherance of the alleged conspiracy.

Plaintiffs in error went to trial upon this indictment. The trial lasted for eight trial days, during all of which time the Smith boys appeared in their own behalf and without counsel (Trans. pp. 17, 18, 19, 20, 26, 27, 28, 29 and 31). The record shows that David Jay Smith was 19 years of age (Trans. p. 142) and that Herman B. Smith was just past 21 years of age (Trans. p. 149).

In giving a brief outline of the testimony as given at the trial we will endeavor to follow the sequence of the events which were offered as evidence of the alleged conspiracy.

June 1, 1917 and June 16, 1917, the dates upon which the conspiracy is alleged to have been launched

are not mentioned in the testimony. Why those dates are used we do not know and there is nothing in the record to enlighten us.

On the evening of June 2, 1917, David Smith was on his way to a social and left in the Hotel Fresno, 44 Eddy St., San Francisco, some packages containing printed copies of the Socialist platform. These pamphlets were to be distributed at a meeting to be held in the Moose Auditorium "right around the corner" from the Hotel Fresno, on the next evening (Trans. pp. 50 and 51, testimony of Bankson). David testified that he had never read the pamphlet (Trans. pp. 146-147). At this time David Jay Smith had no acquaintance with any of the other plaintiffs in error, except his brother Herman and a school-yard acquaintance of some two and a half years prior with Carl J. F. Wacher None of the others had met him nor did they know of the meeting at Moose Auditorium or of the pamphlets. He never saw Daniel O'Connell until the early part of July, 1917, when he employed O'Connell to defend a friend and he never saw or knew of the other defendants until they had been indicted (Trans. p. 142).

The record is silent as to what took place at the meeting in Moose Auditorium.

During the early part of July, 1917, Herman B. Smith, one of the plaintiffs in error went to the office of Daniel O'Connell, to invite O'Connell to speak at a meeting to be held on the evening of July 3rd, 1917. O'Connell refused, giving as the

reason for his refusal the fact that he would not be in San Francisco at the time of the meeting. The meeting was held as contemplated (Trans. p. 149). Herman B. Smith presided and made a speech. None of the plaintiffs in error, other than Herman B. Smith, participated in the meeting (Trans. p. 47). This meeting is not charged as an overt act in the furtherance of the conspiracy. The meeting culminated in the adoption of a set of resolutions, asking Congress to use the military forces only for the purpose of common defense, to submit the draft laws to a national referendum, etc. (Trans. p. 49). These resolutions were forwarded to Congress.

On the evening of July 11 or 12, 1917, a meeting of some 30 or 40 people was held in the Pacific Building, in San Francisco for the purpose of forming an organization, the purpose of such organization being to finance the testing of the constitutionality of the Selective Service Act. Daniel O'Connell presided and the only other of the plaintiffs in error who attended was Herman B. Smith. He acted as temporary secretary of the meeting. On the next day Daniel O'Connell, David Jay Smith and Herman B. Smith met with others in O'Connell's office and signed the articles of incorporation of the American Patriots which organization was to devise ways and means of testing the constitutionality of the Selective Service Act (Trans. pp. 77, 78, 83, 84, 85, 86, 87, 99, 100).

None of the plaintiffs in error, other than the three mentioned attended either of these meetings.

The forming of this corporation is charged as one of the overt acts of the conspiracy.

Both of the Smith boys, David Jay and Herman B., resigned from the American Patriots within two or three days after they had signed the articles of incorporation (Trans. pp. 143, 152, 153).

They knew nothing of its activities subsequent to its organization. Nor did they meet the other plaintiffs in error, save O'Connell, until they were arraigned in court (Trans. pp. 143 and 153).

With whatever the other plaintiffs in error did subsequent to the resignation of the Smith boys from the American Patriots the Smith boys have no concern.

Subsequently the other plaintiffs in error joined the American Patriots. Headquarters were opened and an advertising campaign instituted.

O'Connell, as attorney for the organization drew up a legal opinion as to the constitutionality of the Selective Service Laws. Advice was given to men about to be called under these laws. A claim of exemption was furnished by the organization to those registrants who desired them. Meetings were held in San Francisco and Lodi, California, under the auspices of the American Patriots. All of the acts occurred subsequent to the resignation of the Smith boys from the American Patriots and without their knowledge.

Finally, September 7, 1917, the plaintiffs in error were indicted with one Rev. William C. Mengendoth,

who subsequently testified for the Government and went free. After a nine day trial, at which the Smith boys appeared for themselves and without counsel, a verdict was returned, a copy of which follows:

> "We, the jury, find (naming the defendants) the defendants at the bar, Guilty on the——— count of the Indictment, and———on the——— count of the Indictment" (Trans. p. 32).

I.

Specification of Errors Relied Upon.

That the trial court erred in overruling the demurrer to the indictment, and particularly those portions of the demurrer directed against the constitutionality of the Selective Service and Espionage Acts.

II.

That the evidence is insufficient to warrant a verdict of guilty against Herman B. Smith.

III.

That the evidence is insufficient to warrant a verdict of guilty against David Jay Smith.

IV.

That the trial court erred in pronouncing judgment against Herman B. Smith, and David Jay Smith, inasmuch as the jury did not return a verdict of guilty against them.

V.

That the trial court erred in not appointing counsel to conduct the defense of David Jay Smith.

Argument.

We will now proceed to dispose of the several specifications of error in the order in which they are above set down.

I.

THAT THE TRIAL COURT ERRED IN OVERRULING THE DEMURRER TO THE INDICTMENT AND PARTICULARLY THOSE PORTIONS OF THE DEMURRER DIRECTED AGAINST THE SELECTIVE SERVICE AND ESPIONAGE ACTS.

The case at bar was probably the first case prosecuted under the provisions of the Selective Service and Espionage Acts. These laws had not then been passed upon by this court. Many people doubted their validity, among them these plaintiffs in error and accordingly upon the return of the verdict in this case they sued out a writ of error direct to this court, as was their right. In the course of time this court upheld the constitutionality of the acts in question and as far as counsel is concerned that matter is now closed. But jurisdiction having attached because of the raising of a constitutional question in good faith this court has acquired jurisdiction of all other questions raised by the record herein.

Such is the law established by a long line of authorities.

Horner v. U. S., 143 U. S. 570.

II.

THAT THE EVIDENCE IS INSUFFICIENT TO WARRANT A VERDICT OF GUILTY AGAINST HERMAN B. SMITH.

Herman B. Smith first met Daniel O'Connell during the early part of July, 1917. He endeavored at that time to have O'Connell speak on the constitutionality of the Selective Service Act. Mr. O'Connel did not speak at the meeting owing to the fact that he was not in San Francisco (Trans. p. 149).

The meeting was held on July 3, 1917, with an attendance of about 6,000 people. None of the plaintiffs in error, other than Herman B. Smith participated in this meeting (Trans. pp. 47, 48). Indeed, with the exception of O'Connell and the Smith boys they had not even met one another. Several persons spoke at the meeting, among them Herman B. Smith, who presided (Trans. pp. 47, 48). The meeting culminated in the adoption of a set of resolutions, which were sent to congress and the president (Trans. p. 49).

These resolutions contain nothing that would tend to obstruct or hinder the recruiting service of the army and navy or the successful prosecution of the war. True, the spirit of the meeting and of those who participated was opposed to the war, but noth-

ing that was said or done can be said to have by any manner or means hindered or obstructed the operation of the Selective Service Law. The most that can be said against this meeting is that it showed, upon the part of Herman B. Smith, opposition to the war.

The next we hear of Herman B. Smith is that he appeared on or about July 12, 1917, at a meeting called for the purpose of effecting an organization which would have for its purpose, among other things, the financing of a "test case" to try the constitutionality of the Selective Service Law (Trans. pp. 142, 151). The next day he signed the articles of incorporation of "The American Patriots", in the office of Daniel O'Connell. His brother, David, and Daniel O'Connell, together with several others also signed the articles of incorporation. None of the other plaintiffs in error were incorporators of this organization (Trans. pp. 77, 78, 83, 84, 85, 86, 87, 99 and 100). Herman B. Smith became temporary secretary of the organization, and a day or two later he and his brother, David, resigned, and had nothing more to do with O'Connell or the "American Patriots" (Trans. pp. 143, 153). As to the plaintiffs in error, Wacher, Carey and Hoffman—the Smith boys never saw them or heard of them before the indictment in this case was returned, save for a school yard acquaintance with Wacher.

With what occurred after the resignation of the Smith boys from the American Patriots this brief has no concern; it is a matter to be discussed by

the other plaintiffs in error. It is sufficient to say that the Smith boys parted with the "American Patriots" almost immediately upon the formation of the corporation, and, therefore, should not be made to bear the burden of its future acts, if burden there be.

If a conspiracy ever existed in this case it did not exist prior to the formation of the "American Patriots". As far as the purposes of the organization, as gathered from its articles of incorporation, are concerned, they are consistent with an innocent intent on the part of the Smith boys.

The fact that Herman B. Smith was personally opposed to the war with Germany and to the Selective Service Law does not make him a criminal conspirator. And, if it should appear that he was in sympathy with those who actively opposed and obstructed the working of the Selective Service Law that fact would not be sufficient to sustain the conviction. The case is parallel to that of Olaf A. Tveitmoe reported in

Ryan, et al v. United States, 216 Fed. Rep. 13, 56.

III.

THAT THE EVIDENCE IS INSUFFICIENT TO WARRANT A VERDICT OF GUILTY AGAINST DAVID JAY SMITH.

The case against David Jay Smith does not exist. He had no knowledge of the alleged conspiracy or of the so-called overt acts set forth in the indictment.

A brief resume of the facts in the record relating to David Jay Smith is a sufficient answer to those who would convict this 19 year old boy of a felony.

"Dave", as he is known, was on his way to a "social" on the evening of June 2, 1917. (This was prior to the passage of the Espionage Act). He had been entrusted with a package of pamphlets which were to be distributed at a Socialist meeting in Moose Auditorium. These pamphlets contained the now famous (or infamous) Socialist War platform. He left the package at the Hotel Fresno, "right around the corner" from the hall in which the meeting was to be held, in order that it might be on hand for the meeting (Trans. pp. 50, 51).

David had never met his co-defendants O'Connell, Carey and Hoffman. He had a school yard acquaintance with Wacher, and, of course, he knew his brother, Herman (Trans. p. 142).

During the early part of July, 1917, he engaged O'Connell to defend a friend (Trans. p. 142). He took no part in the meeting, held on July 3, 1917, save as a spectator and did not participate in the meetings prior to the organization of the American Patriots. He did sign the articles of incorporation of the American Patriots. This was innocent enough in itself. The articles of incorporation contain nothing which would suggest a conspiracy such as is alleged in the indictment. The signing of that paper was consistent with innocence. Two or three days later he severed his connection with the American Patriots. He never saw or heard tell of his

co-defendants, Carey and Hoffman until he was indicted. He did not know of, or have anything to do with the subsequent activities of the American Patriots (Trans. pp. 142 and 143).

True, he took the stand and testified that he was opposed to war in general and to the war with Germany in particular, but such sentiments are not felonious *per se.*

His case is also parallel with that of Olaf A. Tveitmoe reported in

Ryan, et al., v. United States, 216 Fed. Rep. 13, 56.

Before concluding this discussion of the facts of the case as far as they concern the Smith boys it might be well to consider briefly the testimony of most of the witnesses, particularly their references to these boys.

William C. Mengendoth, a clergyman, one time co-defendant who testified and received immunity. He never heard of the Smith boys until they were indicted (Trans. pp. 36, 38). Mengendoth was an active member of the American Patriots and supplied a great number of the young men who joined the association.

John Murphy. This witness joined the American Patriots and filed one of their exemption claims. He never saw the Smith boys until he saw them in court (Trans. p. 43).

Florence Kearns. This young lady reported the meeting held on July 3, 1917, over which Herman B. Smith presided. She did not see David Jay Smith at the meeting (Trans. p. 47).

S. B. Bankson. This witness was the proprietor of the Hotel Fresno. He testified that David Jay Smith left the Socialist platforms at his hotel so that they might be available for use at the Moose Auditorium (Trans. pp. 50, 51).

Mattie M. Barkley was a public stenographer. She did stenographic work for the American Patriots. She was frequently in O'Connell's office. She never saw the Smith boys (Trans. pp. 54, 89).

Margaret Nellie Kearns succeeded Herman B. Smith as secretary of the American Patriots. At one time she was indicted with the other defendants. She testified that she never saw the Smith boys after Herman B. Smith resigned as secretary (Trans. p. 84).

The foregoing witnesses were the only ones produced by the Government to connect the Smith boys with the alleged conspiracy.

All of the defendants with the exception of O'Connell took the stand in their own behalf.

Carl J. F. Wacher was an active member of the American Patriots subsequent to August 6, 1917. Although this defendant knew the Smith boys as school mates he never knew or heard of them as associated with the American Patriots or with the other defendants (Trans. pp. 114, 115).

Ernest R. Hoffman, treasurer of the American Patriots, and one of the defendants, never saw the Smith boys until a few days before O'Connell was arrested (Trans. p. 132).

The Smith boys took the stand in their own behalf and testified in substance the matters set forth under headings II and III of this brief.

We have thus gone to considerable pains to note nearly every reference to the Smith boys contained in the transcript in order that this court might readily see of what fragile substance is the chain of circumstances which is woven about these two boys.

Surely no nation demands that two school boys, 19 and 21 years of age be punished as felons in such a case as this. Impetuous boys may need to be restrained but to attempt to brand them as felons upon the case made out by the government is certainly an unwarranted precaution. Surely the United States of America is not in such perilous straits that she must needs protect herself by throwing into jail school boys who have done nothing more than act as messengers and perhaps made a speech or two.

IV.

THE TRIAL COURT ERRED IN PRONOUNCING JUDGMENT AGAINST HERMAN B. SMITH AND DAVID JAY SMITH INASMUCH AS THE JURY DID NOT RETURN A VERDICT OF GUILTY AGAINST THEM.

The jury returned a verdict in words as follows:

> "We the jury, find Daniel O'Connell, David Jay Smith, Herman B. Smith, Carl J. F.

> Wacher, Thomas Carey and E. R. Hoffman the defendants at the bar, guilty on the —— count of the indictment, and —— on the —— count of the indictment" (Trans. pp. 31, 32 and 172).

A careful reading of the foregoing verdict discloses what? Evidently the jury intended to find the defendants guilty on one of the counts of the indictment and not guilty on the other count. That much is clear from a reading of the verdict. The trial court, however, proceeded to impose a sentence under both counts.

There is a material difference between the two counts contained in the indictment. The first count alleges a conspiracy to violate the Espionage Act and the second count alleges a plain conspiracy under sec. 37 of the Criminal Code. The dates of the alleged conspiracies determine these matters. The first count dates the conspiracy from June 16, 1917, one day subsequent to the enactment of the Espionage Act and the second count dates the conspiracy from June 1, 1917.

It thus becomes important to ascertain upon which count, if any, the jury returned a verdict of guilty. If such a fact cannot be ascertained from a reading of the verdict it is fatally defective upon the ground of uncertainty. This court cannot correct such uncertainty by deciding upon which count, if any, the jury intended to return a verdict of guilty. If this court should attempt to do such a thing it would have to decide whether plaintiff in

error, O'Connell, should serve a two year sentence or a five year sentence. Such is not the province of an appellate tribunal. Such a proceeding would deprive these plaintiffs in error of a jury trial. We submit that for this reason alone this cause should be returned to the District Court for a new trial.

V.

THAT THE TRIAL COURT ERRED IN NOT APPOINTING COUNSEL TO CONDUCT THE DEFENCE OF DAVID JAY SMITH.

At the time of the trial David Jay Smith was 19 years of age (Trans. p. 142).

The trial of the cause covered nine days. Thirty-nine witnesses were examined. It will be noted that this case was one of the first, if not the first, tried under the Espionage Act. Indeed, the conspiracy is alleged to have been set on foot the day after the passage of that Act. This court will take judicial notice of the fact that the feeling against persons opposed to the war and charged with offenses of this kind ran high. Under such circumstances every safe-guard possible should be placed about persons charged as these defendants were.

And under these circumstances 19 year old David Jay Smith and his brother Herman B. Smith, but twenty-one years of age went to trial, appearing in their own behalf and without counsel (Trans. pp. 17, 18, 19, 20, 26, 27, 28, 29, 31, 190 and 191).

Under this heading we will, in passing, note the speed with which this cause proceeded. The in-

dictment was returned on September 7, 1917 (Trans. p. 6). The defendants were arraigned and informed of their rights on September 11, 1917, and a demurrer was interposed and overruled and the cause set down for trial for September 12, 1917 (Trans. p. 16). On September 12, 1917 the trial was commenced and lasted for nine days.

The Constitution of the United States guarantees that,

> * * * "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. * * * *and to have the assistance of counsel for his defense*" (Const. U. S. Amend. 6).

This is the absolute right of the defendant. But it will be urged that a defendant may waive this right. In a proper case, we admit, this right may be waived. A person, *non sui juris*, however, cannot waive this right. Such is the well settled rule of decision.

> "Every person, *sui juris*, who is charged with crime has the right to try his own cause if he so desires. A trial court is not justified in imposing counsel on a defendant against his will, unless, indeed, it appears that he is mentally incompetent, *or not sui juris* at the time of the trial" *(8 Ruling Case Law*, page 83).

> "Usually the Court is not required to assign counsel to accused, except where he requests the same and shows that he is financially unable to employ counsel; *but where accused is not of sufficient mental capacity to conduct the defense or to understand its nature, it is the duty of the court to see that he is properly represented by counsel" (16 Corpus Juris*, page 822).

Can it be said of any 19 year old boy that he is capable of personally conducting a trial of the nature of the case at bar and particularly under the peculiar circumstances which surrounded this case?

True, one of the defendants, Daniel O'Connell, was an attorney and appeared for himself and the defendants other than the Smith boys and in one or two instances went so far as to assume authority to sign papers for all of the defendants. This, however, does not cure the error. For reasons not appearing in the record the Smith boys refused to have anything to do with O'Connell, they resigned from his organization, the American Patriots, and refused his assistance at the trial. Had they been represented by counsel at the trial the reason of the separation between the Smith boys and the other defendants might have appeared in the record and have resulted in a different verdict as far as they were concerned. This is not idle speculation but goes to show how injustice is apt to occur under such peculiar circumstances.

No citation of authority is necessary to demonstrate that had this cause been a civil proceeding and it appeared from the face of the record that David Jay Smith, a person *non sui juris* had not been represented by a guardian *ad litem* and had in such action lost a property right, that a judgment under such circumstances would not stand. How much more reason is there to protect a person in his liberty under these circumstances.

In support of this contention we respectfully direct the attention of the court to the following citations:

Garner v. State, 97 Ark. 63; 132 S. W. 1010; Ann. Cas. 1912 C. 1059;

Dietz v. State, 136 N. W. 166; Ann. Cas. 1913 C. 732;

Peo. v. Goldenson, 76 Cal. 328, 344;

Stephenson v. State, 21 Ohio Cir. Ct. Rep. (N. S.) 287.

Conclusion.

In concluding this brief submitted on behalf of the Smith boys we would raise one question. At what time did this alleged conspiracy originate? The defendants never met for a common purpose until the time of the formation of the American Patriots, about the middle of July, 1917.

The meeting at Moose Hall was held long before the defendants had ever met and David Jay Smith was the only defendant who had any knowledge of this meeting. Evidence of this meeting and the facts surrounding it was only admissible to show the state of mind of David Jay Smith.

The meeting at Dreamland Rink on the evening of July 3, 1917, is not claimed to be an overt act in pursuance of the alleged conspiracy. Herman B. Smith is the only member of the alleged conspiracy who participated in or had any connection with that meeting. Evidence of this meeting was

only admissible to show the state of mind of Herman B. Smith.

These being admittedly the facts, the conspiracy could not have come into existence until on or about the 11th day of July, 1917, at which time the "American Patriots" was incorporated. There can be no quarrel about the legality of the purposes for which this corporation was formed. We may disagree with its purposes and aims. The incorporators may have been "wild eyed agitators" and wholly "undesirable citizens", but they still had a right to form a corporation for a lawful purpose.

Such being the fact, the first overt act occurred on August 1, 1917, when Daniel O'Connell is alleged to have prepared and caused to have been distributed a document entitled "Legal opinion and advice to American Patriots" (Trans. pp. 4 and 6).

But, the Smith boys had long prior severed their connection with O'Connell and the "American Patriots".

The first overt act of a conspiracy fixes the *locus penitentiae*. Before that act is done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute.

U. S. v. Britton, 108 U. S. 199, 204.

The Smith boys, David and Herman, having abandoned the "American Patriots", and the other alleged conspirators prior to the commission of any overt act by the alleged conspirators tending to obstruct the recruiting and enlisting service of the

United States, have thus avoided the penalty prescribed by the statute.

Fully aware that this court is ever ready to look through form to the substance, we again ask its indulgence in calling to its attention errors which may not, and under the circumstances could not, have been assigned as required by law and the rules, to the end that no injustice may be done to "even one of the least of these".

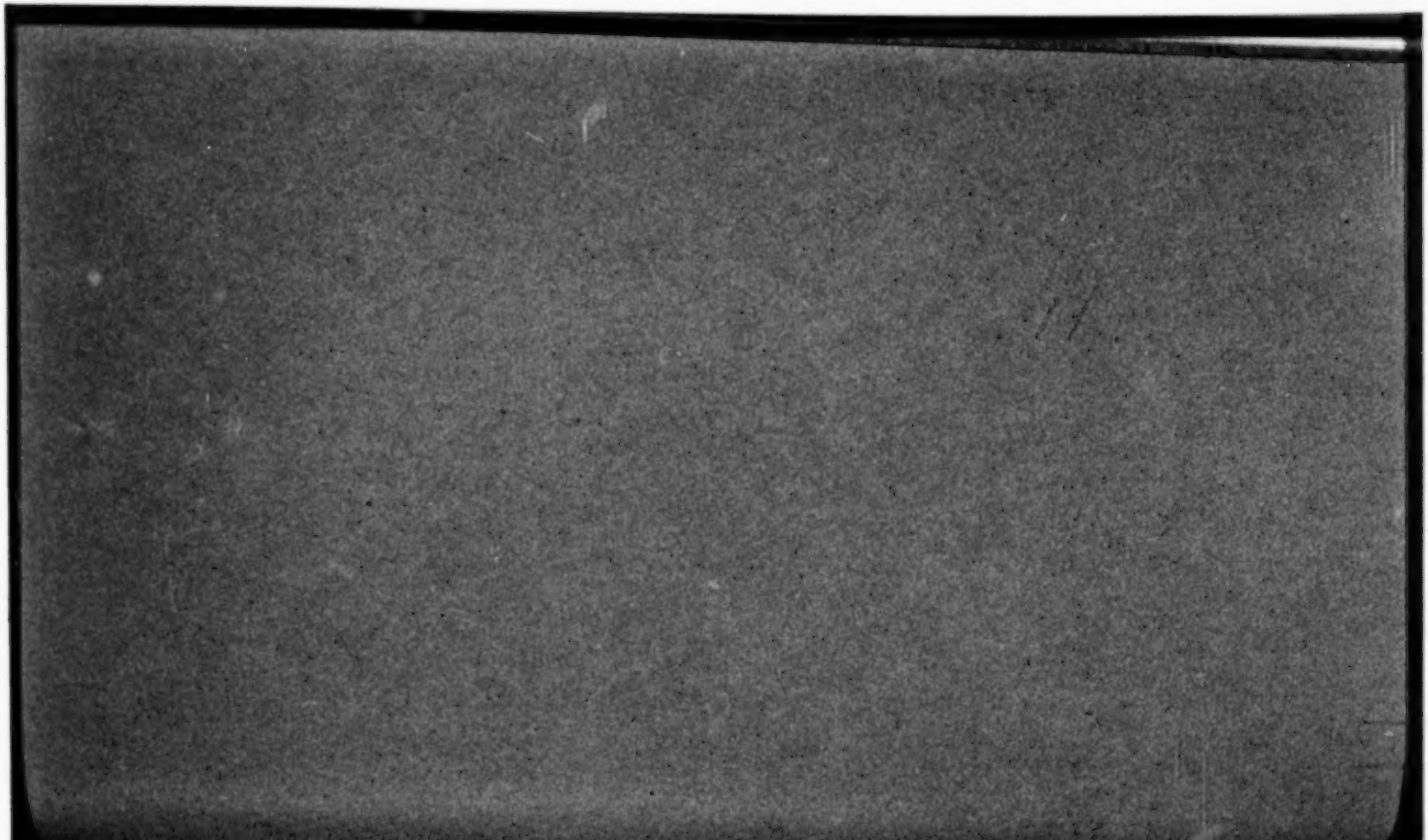
Dated, San Francisco,
October 11, 1919.

Respectfully submitted,

DAVID JAY SMITH,
HERMAN B. SMITH,
Plaintiffs in Error,
in their own Behalf.

Owing to the fact that counsel who prepared this brief is not admitted to practice in the Supreme Court of the United States and that the undersigned plaintiffs in error are without means with which to procure counsel so admitted they have been forced to appear in their own behalf.

DAVID JAY SMITH.
HERMAN B. SMITH.



Due service and receipt of a copy of the within is hereby admitted

this _____ day of October, 1918.

_____

United States Attorney,

_____

Assistant United States Attorney,

Attorneys for Defendant in Error.

INDEX.

	Pages
Admissions by U. S. Attorney	72, 78
Argument	216
Assignment of Errors	165
Amended Assignment of Errors	167
Charge to Jury, parts excepted to	179
Demurrer to Indictment	4, 226
Evidence for the Government	50
Evidence for the Defense	163
Evidence in the Case	50
Facts, uncontradicted	110
Indictment	1
Judgment	165, 236
Overt Acts, First, Government's Evidence	11
Overt Acts, Second, Government's Evidence	16
Overt Acts, Third, Government's Evidence	26
Overt Acts, Fourth, Government's Evidence	30
Plain Errors and Point I—Prejudice	216
Plain Errors and Point II—Constitutional Question	217
Plain Errors and Point III—Constitutional Question	218
Plain Errors and Point IV—Demurrer	226
Plain Errors and Point V—Admission of Evidence	230
Plain Errors and Point VI—Refusal to quash indictment and direct acquittal at close of government's evidence	233
Plain Errors and Point VII—No Evidence	237
Plain Errors and Point VIII	237
Plain Errors and Point IX—No Evidence	237
Plain Errors and Point X—No Evidence	237
Plain Errors and Point XI—Motion for direct verdict at close of all evidence	238
Plain Errors and Point XII—Instructions to jury	239
Plain Errors and Point XIII—Verdict uncertain	243
Questions Raised, Evidence, First Overt Act	13
Questions Raised, Evidence, Second Overt Act	18
Questions Raised, Evidence, Third Overt Act	29
Questions Raised, Evidence, Fourth Overt Act	32
Rulings of District Court Admitting Evidence	199
Rulings of District Court Rejecting Offered Evidence	206

Pages
Rulings of District Court to Direct Acquittal at Close of Government's case 198
Statement of the Case 1
Statement of Government's Evidence on Conspiracy 50
Statement of Government's Evidence, First Overt Act 11
Statement of Government's Evidence, Second Overt Act 16
Statement of Government's Evidence, Third Overt Act 26
Statement of Government's Evidence, Fourth Overt Act 30
Statement of Government's Evidence of Other Acts 34
Statement of Evidence of Defense on Conspiracy 129
Statement of Evidence of Defense on First Overt Act 13
Statement of Evidence of Defense on Second Overt Act 18
Statement of Evidence of Defense on Third Overt Act 29
Statement of Evidence of Defense on Fourth Overt Act 32
Statement of Evidence of Defense on Intentions and Good Faith 163
Theory on which Case Started and Tried 4
Theory on which Case Decided 4

LIST OF CASES CITED.

Pages
Allen vs. U. S., 115 Fed. 3 232
Allison vs. U. S., 160 U. S. 212 ..... 241, 242
American Ann. Cas., 1916 A. 1243 240
Atchison vs. Denver, 110 U. S. 679 222
Beard vs. U. S., 158 U. S. 554 ..... 240, 241, 242
Binford vs. Sanner, 40 Pa. St. 9, 80 Am. Dec. 545 231
Bird vs. U. S., 180 U. S. 362 ..... 241, 243
Blain vs. State, 33 Tex. Crim. App. 236 231
Breese vs. U. S., 48 C. C. A. 36, 108 Fed. 804 ..... 240, 243
Brown vs. U. S., 150 U. S. 9, 232
Buchanan vs. Warley, 245 U. S. 60 221
Buckstaff vs. Russell, 151 U. S. 637 238
Const. of Cal., Art. I, Secs. 1 and 2 39
Conrad vs. U. S., 127 Fed. 798 237
Cornelius vs. Com., 15 B. Mow. (Ry.) 539 243
Cruickshank vs. Bidwell, 176 U. S. 73 235
Cruikshank vs. U. S., 92 U. S. 552 221
Cuyle vs. McCartney, 40 N. Y. 221 231
Daily vs. Superior Court, 112 Cal. 94 39

Pages
Daily vs. Superior Court, 112 Cal. 94 225
Dealy vs. U. S., 152 U. S. 539 232
Dolan vs. U. S. 243
Fain vs. U. S., 209 Fed. 525 41
Frohwerk vs. U. S., 249 U. S. 233
Gill vs. State, 56 Tex. Crim. 202, 17 Ann. Cas. 1164 232
Handley vs. State, 115 Ga. 584 236
Hanimer vs. Dagenhart, 247 U. S. 251 221
Hart vs. Hopson, 52 Mo. App. 177 231
Hewich vs. Saier, 124 Mich. 86, 82 N. W. 879 231
Hibbard vs. U. S., 172 Fed. 66 242
Hickory vs. U. S., 160 U. S. 425 ..... 242, 243
Hicks vs. U. S., 150 U. S. 442 242
Hopt vs. Utah, 114 U. S. 488 233
Johnston vs. U. S., 225 U. S. 405 233
Langford vs. State, 130 Ala. 74 231
Logan vs. U. S., 144 U. S. 264, 309 232
Lyons vs. State, 30 Tex. App. 642, 8 Cyc. 642 236
Masters vs. U. S., 42 App. Cas. (D. C.) 350 240
McDonald vs. People, 126 Ill. 150; 9 Am. St. Rep. 547 232
Milligan, Ex Parte, 4 Wall. 2 221
Mills vs. U. S., 164 U. S. 644 242
Monongahela vs. U. S., 148 U. S. 324 222
Mullen vs. U. S., 106 Fed. 892 243
Myers vs. State (Fla. 1901), 31 So. 275 236
New Orleans vs. Abbagnato, 62 Fed. 245; 26 L. R. A. 334 226
Paul vs. State, 12 Texas Appeal 346 231
People vs. Brady, 40 Cal. 198; 6 Am. Rep. 604 226
People vs. Eppinger, 109 Cal. 297 243
People vs. Irwin, 77 Cal. 494 231
People vs. Flack, 125 N. Y. 324, 11 L. R. A. 807 234
People vs. Garnett, 129 Cal. 365 243
People vs. Lee, 94 Cal. 386 243
People vs. Mitchell, 92 Cal. 590 243
People vs. Parker, 67 Mich. 222; 11 Am. St. Rep. 578 231
People vs. Powell, 63 N. Y. 88 234
People vs. Stevens, 68 Cal. 113 231
People vs. Seeley, 139 Cal. 118 ..... 39, 225
Penal Code of U. S., Sec. 37 40
Prettyman vs. U. S. (C. C. A.) 180 Fed. 43 235

Pages
Quarles, In Re, 158 U. S. 535 226
Rea vs. Missouri, 17 Wall. 532 231
Reagan vs. U. S., 157 U. S. 301 242
Rudd vs. U. S., 173 Fed. 912 243
Sandals vs. U. S., 213 Fed. 569 242
Sandberg vs. U. S., 257 Fed. 643 237
Schenck vs. U. S., 349 U. S. 218
Slider vs. U. S., 257 Fed. 620 237
Smith vs. Shoemaker, 17 Wall. 630, 639 216
Sparf and Hansen vs. U. S., 156 U. S. 56 ..... 231, 232
Stair vs. U. S., 153 U. S. 614 243
State vs. Moberly, 121 Mo. 604 232
Stelton vs. U. S., 96 U. S. 699 237
Stewart vs. U. S., 211 Fed. 41 243
Thompson vs. U. S., 155 U. S. 271, 281 243
Union Pacific vs. U. S., 173 Fed. 740 42
U. S. vs. Babcock, 3 Dill 581, 545, 24 Fed. Cas. 14, 487 231
U. S. vs. Bennett, 65 Fed. 62 237
U. S. vs. Biggs, 211 U. S. 507 41
U. S. vs. Cassidy, 67 Fed. 698 233
U. S. vs. Cruikshank, 92 U. S. 552 222
U S. vs. Grodson, 164 Fed. 157 232
U. S. vs. McKee, 3 Dill. 546; Fed. Cas. 15, 685 231
U. S. vs. Newton, 52 Fed. 275 ..... 231, 233
U S. vs. Richards, 149 Fed. 443 232
U S. vs. Ry. Co., 178 Fed. 19 237
Western Union vs. Pendleton, 95 Ind. 15; 48 Am. Rep.
Wiborg vs. U. S., 163 U. S. 426 234
Williams vs. State, 81 Ala. 1, 60 Am. Rep. 133 236
Williams vs. U. S., 158 Fed. 30 242
Williamson vs. U. S., 207 U. S. 425 ..... 218, 230
Williamson vs. U. S., 207 U. S. 449 ..... 233, 234
Wilson vs. People, 94 Ill. 299 232
Wilson vs. Shaw, 204 U. S. 31 222
Wilson vs. U. S., 160 Fed. 427 41
695 226
Winchester vs. Creary, 116 U. S. 161 231
Wood vs. State, 47 N. J. L. 461 234

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919,

NO. 697.

DANIEL O'CONNELL, ET AL.,

Plaintiffs in Error.

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DANIEL O'CONNELL AND CARL J. F. WACKER,

STATEMENT OF THE CASE.

I.

The defendants were indicted for two *conspiracies.* The first count charged that the defendants at San Francisco, Cal., on June 16, 1917, and ever since, did knowingly and feloniously combine, conspire, confederate and agree together and with divers other persons whose names are unknown "to commit an offense against the United States, to-wit: *the offense of knowingly and wilfully obstructing the recruiting and enlistment service of the United States to the injury of the said service*" by conspiring "to persuade and in-

duce various men whose names are unknown, between the ages of 21 and 40 years inclusive, *to refuse to enlist* in the military service of the United States"; (Tr. p. 2, fol. 4), and "to persuade and induce male citizens of the United States and others subject to duty under the Draft Act of May 18, 1917, *to refuse to be enlisted and recruited in the military service by selective draft,* to the injury of said military service; *to refuse to enlist in the military service; to refuse to register or be registered* under the provisions of said law; to induce and persuade them *to file false claims of exemption from said service;* to *refuse to present themselves for physical examination,* or to *submit to physical examination,* and *refuse and fail to appear when called for military service under said Act,* rules and regulations.

The indictment then set forth four overt acts:

1. That the defendants O'Connell and the two Smiths, at San Francisco *on or about July 12, 1917,* caused "to be incorporated an association called the 'American Patriots.'"

2. That on *August 4, 1917, defendant Carey filed with the exemption board* for division IV of San Francisco, a claim of exemption containing among other things the following language: "I am certain that notwithstanding all the humbug and lies published in the newspapers, and other publications of the world, there is not, and cannot be, the slightest danger to the United States, as this war is simply a war of aggression, conquest, and greed on the part of England; and England and her agents have secured a vote of Congress assisting them in this war, which vote was in violation of the Constitution and will be reconsidered by the next Congress who will have full power and express directions from the people."

3. That on *August 4, 1917,* defendant Daniel

O'Connell went from San Francisco to Lodi, California.

4. That on or about August 1, 1917, *defendant Daniel O'Connell* at San Francisco *did prepare and cause to be distributed a document* entitled, "legal opinion and advice on the conscription law to American Patriots," all in pursuance of said conspiracy, and to effect and accomplish the object thereof, and all contrary to the form of the statute of the United States.

The second count alleged that on *June 1, 1917,* defendants knowingly and feloniously did conspire, combine, confederate and agree together, and with divers other persons unknown, to commit an offense against the United States, that is *conspire and agree together to make and cause to be made, false statements, and certificates, as to their liability, and as to the liability of* William Mettler, Jacob M. Hershman, Henry Christman, John Murphy, Harry Ungar, Reuben Ungar, and divers other persons unknown, *for military service under the provisions of the Act of May 18, 1917, selective service law,* and the regulations made by the President thereunder, and to *aid, abet, counsel, and induce* the said named persons and divers other persons unknown, who had attained their twenty-first birthdays, and had not attained their thirty-first birthdays, and who were liable for military service under the draft act, *to evade the requirements of said act, rules and regulations,* and particularly to aid, abet, counsel, and induce the said persons *to refuse and fail to present themselves for physical examination* required under said act, rules, and regulations, and to *fail and refuse to appear and report for military service when called, certified, and ordered to report in person* for military service under the terms of said act, and to *fail to do and perform any of the things required of them or any of them*

under the said act, rules, and regulations. It also alleged the same four overt acts as in the first count, in pursuance of said conspiracy and to effect and accomplish the object thereof, contrary to the form of the statute.

II.

DEMURRER.

A demurrer to these counts was filed and overruled. Some of the points raised have been disposed of by this Court. The other points are considered in the last part of this brief. It raised among other questions, that of the unconstitutionality of the Draft Act; and of the Espionage Act.

III.

GOVERNMENT EVIDENCE INSUFFICIENT.

The unfortunate thing about this case is that the *Supreme Court of the United States* as well as the defendants are deprived of the benefit of those matters struck out of the bill of exceptions by the District Court, the effect of which is seen in the record.

There was not a particle of evidence offered by the Government to support either of those two counts. On the contrary *the evidence of the Government disproved said allegations, and this disproof was corroborated by the evidence offered by the defendants.*

IV.

THEORY ON WHICH CASE WAS DECIDED.

It was *this condition of the evidence* that caused the District Court to agree with the theory of the prosecution and *change its rulings* and views of the law on which the defendants tried the government's case; *and defendants were misled by the changed rulings* of the Court, as the *evidence offered by the government made no case whatever;* and the *changed rulings and instructions amounting to an ORDER for a verdict of guilty, WERE NECESSARY, ON THE EVI-*

DENCE, TO SECURE THAT VERDICT OF GUILTY.

The case was *decided,* and the *jury practically and substantially directed to return a verdict of guilty* against all the defendants *upon the theory that REGARDLESS OF THE GOOD FAITH OF THE DEFENDANTS,* if they *DIRECTLY QUESTIONED THE CONSTITUTIONALITY OF THE DRAFT ACT TO COMPEL FOREIGN SERVICE,* and *ORGANIZED, OR BECAME MEMBERS OF, A CORPORATION AND MOVEMENT, FOR THE PURPOSE OF RAISING FUNDS TO CARRY A TEST CASE, OR CASES, TO THE SUPREME COURT OF THE UNITED STATES,* and *THEY KNOWINGLY AND WILFULLY DID THAT,* and it *RESULTED* in obstruction to enforcement of the draft Act, *OR MIGHT SO RESULT,* or was *CALCULATED TO SO RESULT,* then the defendants were all guilty of conspiracy as alleged in each of the two counts, *regardless of their intention or good faith.*

V.

DISTRICT COURT RULINGS.

The District Court in admitting in evidence, *over the objections of the defendants,* the records in the two cases of U. S. vs. Gambo and U. S. vs. Cohen, on indictments for failure to register, filed *June 19, 1917,* to which indictments, *demurrers* were filed *setting up the unconstitutionality of the draft act,* or selective service law, which actions went to verdicts and judgments *June 27, 1917,* sentencing Gambo to *one hour in custody of the U. S. Marshal, and Cohen to 30 days in jail, and no appeal was taken,* although the demurrers "setting up the unconstitutionality of the draft act is in substantially the same manner and language as set forth in the demurrer in the present case, and the demurrers were offered in evidence and read to

the jury for the purpose of showing that Mr. O'Connell then had an opportunity to test the draft act and did not do it as each of the defendants served their time and has been discharged at the expiration of their time", (Tr. p. 74, fol. 121), and *for the purpose of showing bad faith in Mr. O'Connell's actions in the present case in not so appealing from the decisions in those two cases* and the District Court in admitting the evidence over the objections of the defendants *made its ruling and gave the law of the case FOR THE GUIDANCE OF THE DEFENDANTS as follows:*

The Court: Mr. O'Connell here is the situation: Your defense as I understand it—the defense of the defendants is that being honestly of the opinion that this act was unconstitutional that you took steps to organize this corporation, the American Patriots, by reason of the fact that you felt you were entitled to have an aggregation contribute because it was too onerous upon any one man; that you accordingly gathered together in that form with the genuine and honest purpose of testing this law, the constitutionality of it, gathered together these people. Now of course, there is no question but what either an individual as I shall be called upon to advise the jury—has the right in good faith to test any law that affects his rights, his liberty, his life—and as you have requested in your proposed instructions; *but the prosecution certainly has the right to show that that was not the real object of THIS CORPORATION at all;* they have the right to show that the methods pursued were *not in harmony* with any such purpose at all; they have the right to show that THIS CORPORATION not only through its individual members, made declarations which were *at variance* with any such purpose, but issued propaganda which was of a nature to be *against such a purpose;* that is, I mean A PURPOSE that went beyond

any mere desire to test the Act and to deter and induce others to refuse to subscribe to the Act. *That is all they are trying to do.* That is perfectly proper. IF IT IS FOUND BY THIS JURY THAT THE PURPOSES OF THIS CORPORATION AND THE ACTS DONE UNDER ITS ORGANIZATION WERE AS YOU SAY, AND NOT AS THE PROSECUTION CLAIMS THEM, THEN, OF COURSE YOU CANNOT BE CONVICTED; on the other hand, if it appears that THE CORPORATION was used merely as a cloak through which to reach a large number of people with a course of solicitation and representation and propaganda which would be in *ITS nature calculated* to induce others not to enlist, or not to subscribe to the draft act, then the jury would have the right to find that that was *the purpose of the CORPORATION, instead of the GENUINE ONE OF TESTING THE CONSTITUTIONALITY OF THE ACT. THAT IS THE WHOLE QUESTION.* And this is directed to that. I want you to understand the *reason* of my rulings as we go along." (Tr. on motion for certiorari, pp. 4, 5, and in Amended Assignment of Error, pp. 31, 32.)

VI.

The first meeting at which it was suggested to organize that corporation was held *July 11, 1917, which is the first date of any communication between any of the defendants on any subject* as shown by the government's evidence, *which was fourteen days after the entry of those judgments.* The foregoing quoted ruling was made on September 18, 1917, in the presence of the jury and on the next day of the trial, September 19, 1917, (Tr. fols. 34, 35), in the presence of the jury in deciding motions to strike out certain portions of the evidence and direct an acquittal at the close of the government's evidence, the District Court made the

following declarations and rulings, *changing its rulings of the day before,* as follows:

"The Court: Mr. O'Connell, this charge is conspiracy to do what? To obstruct the execution of the so-called draft act. As I had occasion to remark this morning, *obstruction means any* method of procedure which MIGHT either directly or INDIRECTLY TEND TO AN OBSTRUCTION of the execution of the law; in other words, ANYTHING which would be *calculated* to bring about and produce a state of mind in the public with reference to this act which would be *calculated* to *RESULT* in *anyone* subject to its provisions being deterred from acquiescing in its requirements, subscribing to them, would be a pertinent matter to go to the jury as tending to show what the purpose of the defendants was in anything they did." (Tr. p. 88, fol. 143.) The foregoing ruling was *not on the admission of evidence,* but stating the *law for the decision of the case.* (Tr. p. 88, fol. 143.)

Later on the same day in the presence of the jury, in denying the motion to quash the indictment, and direct an acquittal at the close of the government's case, declared (Tr. p. 91, fol. 148) that "there is absolutely no evidence in the case as you suggest; that there was any effort on the part of any of the defendants to induce men not to register" or (Tr. top of page 92) "to refrain from registering and to refrain from taking the physical examination, etc.," but then and there ruled that: "if taking the sum of the evidence together it is sufficiently proven to the mind of this jury *that what has been shown to have been done WOULD IN ITSELF have obstructed* the *execution of this law, THAT IS SUFFICIENT to entitle the case to go to the jury. That IS ALL THAT IS NECESSARY;*" (Tr. p. 92, fol. 148.) "Now, it is exactly so with the other circumstances which are alleged as having been done to bring about an *obstruc-*

tion of this act; the fact that it is alleged that among other things they sought to deter men from *registering, and there is a failure to establish the fact, that does not militate against the sufficiency of the evidence* under the entire charge if nevertheless there are sufficient facts shown to satisfy the jury that there was A CONSPIRACY and that *OTHER ACTS were done which were intended to and did obstruct the execution of this act.*"

"Mr. O'Connell: When they alleged knowingly and wilfully—which of course is necessary to aver—to obstruct, etc., that is, to those who know that the act performed will have that effect, and that they performed them *with the INTENTION* that such shall be their operation.

The Court: That is undoubtedly true. Of course you are well aware that the term *'knowingly' in the criminal law simply means intentionally, wilfully:* that they did AN ACT conscious that they were doing IT, and that *ITS effect MIGHT BE* to produce the *RESULT charged* as having been *produced.* • • • We all know that ignorance of the law does not excuse. (Tr. p. 92, fol. 149). • • •

Mr. O'Connell: I would like to cite to your Honor the following cases: Brown vs. U. S., 150 U. S. 93-98; Sparf vs. United States, 156 U. S. 51; Logan vs. United States, 144 U. S. 263-309.

The Court: What is the point?

Mr. O'Connell: Acts and declarations to show the conspiracy must be direct and not be inference; that they cannot be considered by inference but must be direct. And also on this proposition, that it is not sufficient that it was the joint act of the defendants, but must have been pursuant to a previous conspiracy.

The Court: Proceed with the evidence.

Mr. O'Connell: I desire to save an exception to the overruling of all our motions.

The Court: Very well." (Tr. p. 94, fol. 152.)

VII.

Also in the charge to the jury, the District Court made the same ruling in the final sentence of his charge as follows:

"IT MAKES NO DIFFERENCE HOW HONEST THEIR VIEWS MAY HAVE BEEN; AS I HAVE SAID TO YOU, if they have *DONE ACTS which under the law would RESULT in obstructing the execution of this statute,* and there was a combination between them for the purpose, *THEN THEY ARE GUILTY."* (Amended Assignment of Errors, top of page 16.)

In other words, the jury were made to understand, as everybody else who heard it understood that *AS* there was an *admitted "combination* between them (the defendants) for the purpose of carrying out the objects and purposes" *OF THE CORPORATION* and any *"acts done"* which "would RESULT in obstructing the execution of this statute" *whether they INTENDED that result or not,* and *regardless* of "how honest their views may have been", *"THEN THEY ARE GUILTY;"* or in other words, whether they had had any *INTENTION TO OBSTRUCT* the execution of the draft act; or any *INTENTION TO "OBSTRUCT THE RECRUITING AND ENLISTMENT SERVICE OF THE UNITED STATES;"* or any *INTENTION TO CAUSE anybody "TO REFUSE AND FAIL TO APPEAR WHEN CALLED FOR MILITARY SERVICE UNDER SAID ACT, RULES AND REGULATIONS;"* or any *INTENTION* to "aid or abet" any person "to *evade* the requirements of said act, rules and regulations"; or any *INTENTION* to cause anybody "to fail and refuse to report for military service when called, certified and ordered to report in person for military service under the terms of said act;" or any INTENTION to cause any

person "to fail to do and perform any of the things required of them or any of them under the said act, rules and regulations;" in short OR ANY INTENTION TO COMMIT ANY OF THE CRIMES CHARGED IN EITHER COUNT OF THE INDICTMENT; or any INTENTION to conspire, or enter a conspiracy, or carry out the objects of the conspiracy, was ENTIRELY IMMATERIAL under these rulings and instructions. The District Court further showed that this was *its opinion of the law, and the theory on which it was to force a decision of the case when it ruled out all evidence of the TRUTH of statements made, written or circulated by the defendants, and all evidence of GOOD FAITH, or GOOD INTENTIONS of the defendants WHEN OFFERED BY THE DEFENDANTS.*

(Tr. p. 120, fol. 193; p. 121, fol. 194; p. 125, fol. 201; p. 140, fol. 224; p. 149, fol. 237; p. 160, fol. 254; p. 161, fol. 255; p. 165, fol. 261; p. 166, fol 263; pages 167, 168, 169, 170, 171.)

These objections were made *directly on the ground that such evidence was IMMATERIAL and the District Court sustained the objection*—in some instances *openly* declaring that *such evidence was "WHOLLY IMMATERIAL."*

VIII.

The Conspiracy First Alleged Overt Act. Three of the defendants, Daniel O'Connell, David J. Smith, Herman B. Smith, were three of the five incorporators, and the other defendants afterwards became members, of the duly, lawfully chartered corporation called "American Patriots." Among the purposes and objects of the corporation were to test the constitutionality of the draft act *in the courts,* and no profit, or dividend, or dividend sharing, or profit sharing, were ever to be any of the objects of that corporation. The estimated costs of the *test-*

ing of the constitutionality of the draft act by carrying a case or cases, one or many, to the SUPREME COURT OF THE UNITED STATES was estimated to be at least $5,000, which was too much for any individual to pay, and by incorporating, each paying a small part, the amount of money could be raised, and $5.00 was finally fixed as the entrance fee, and $1.00 a month as the dues for members of this corporation.

Forming corporations for the purpose of raising money to carry on litigation for the purpose of testing in the highest Court some official actions of legislative bodies was a common practice in San Francisco and other places. (Tr. p. 131, fol. 209.) The first meeting for the purpose of organizing a corporation was on *July 12, 1917.*

The government did not offer any other evidence of any other meeting, arrangement, understanding, agreement, conspiracy, joint actions, or activity, on the part of any of the defendants at any time prior thereto, or thereafter. There was no evidence of even an acquaintance between any of the *defendants prior to July 12, 1917. The Government's case closed with no evidence whatever of any communication whatever between any of them prior to July 12, 1917.*

The articles of incorporation were filed July 13, 1917, and on July 14, 1917, the Secretary of State of the State of California duly *issued a charter* to the American Patriots as a corporation *organized for lawful purposes authorized by law,* said purposes being the following:

"To defend, maintain and enforce the letter and spirit of each and every provision of the Constitution of the United States, and the Constitution of California.

"To challenge and test in the courts each and every

Act of Congress and the executive department which violates said Constitution.

"To test the constitutionality of the so-called draft or conscription act now sought to be enforced.

"To test the constitutionality of every act of the executive and legislative departments forcing any person in the land or naval forces of the United States to render military services in Europe.

"To amend the Constitution of the United States so that war can never be declared except by vote of at least two-thirds of the registered voters of the United States.

"To amend the Constitution of the United States so as to incorporate therein the initiative, referendum and recall substantially as contained in the Constitution of California.

"Neither profit, nor profit sharing, nor dividends, nor dividend sharing, nor any financial gain, to any of the members, or otherwise, shall ever be any of the objects of this corporation."

The foregoing was all the evidence of the government on the first alleged overt act—organizing the corporation.

IX.

QUESTIONS RAISED.

Among the *QUESTIONS involved in this appeal,* raised about this stage of the case, on objections to the admission of evidence offered by the government, and at the close of the government's case on motions to strike out this evidence, and again on motion to quash the indictment and direct an acquittal (Tr. pp. 88-89, fols. 142-161) were the following:

1. There was no evidence of any of the conspiracies *alleged in either count of the indictment.*

2. There being no evidence of any communication or acquaintance, whatever between any of the defendants *prior to July 12, 1917,* evidence that on *June*

2, 1917—forty days before—a special agent of the Department of Justice seized two grips containing about 5000 leaflets of the Socialists party anti-war platform called Document No. 5, (referred to, and quoted from by Supreme Court of the United States in Debs vs. United States, 39 Sup. Ct. Reporter, page 254) being U. S. Exhibit No. 16, found in a hotel, left there by the defendant David J. Smith, to be distributed at a Socialist party mass meeting Sunday *June 3, 1917,* without any evidence whatever connecting any of the other defendants, was prejudicial error. (Tr. p. 51, fols. 84, 85; p. 52, fol. 86.)

3. Admitting in evidence, reading to the jury, and delivering to the jury copies of those leaflets so seized was prejudicial error. (Tr. p. 52, fol. 86.)

4. Admitting in evidence, showing and reading to the jury, red cards (U. S. Exhibit No. 13) advertising that mass meeting of the Socialist party for *Sunday June 3, 1917* (U. S. Exhibit No. 13) without in any way connecting any of the other defendants with it, was prejudicial error. (Tr. p. 51, fol. 84.)

5. Admitting in evidence the fact that defendant, Daniel O'Connell, as an attorney and counsellor at law appeared in this U. S. District Court as counsel for two defendants in the cases of U. S. vs. Gambo and U. S. vs. Cohen and *thereafter on June 19, 1917,* filed a demurrer to each indictment in each case, *setting up the unconstitutionality of the draft act in substantially the same manner and language as in the demurrer filed in this case* and those cases went to verdict and judgment *June 27, 1917,* the said Gambo was sentenced *to one hour in the U. S. Marshal's office, which he served, and said Cohen was sentenced to 30 days in jail, which he served,* and no writ of error or appeal was taken, and the records in both cases were admitted in evidence to show that Daniel O'Connell was *not acting in good faith in questioning the consti-*

tutionality of the draft act, as he had an opportunity then to take it to the Supreme Court of the United States and did not; and also for the purpose of showing that the *organization and purposes and acts* of the corporation called American Patriots, organized *July 12, 1917, were not done in good faith, and not for the genuine purpose of testing the constitutionality of the draft act,* although that organization was *15 days after* the judgments in those cases. (Tr. pp. 74, 75, 76, fols. 121, 122, 123.)

6. Admitting in evidence dodgers advertising an anti-drafting mass meeting for *July 3, 1917,* at which Herman B. Smith was advertised to be the chairman, but no mention was made of any of the other defendants, and with which meeting none of the other defendants had any connection or relation. (Tr. p. 47, fol. 78.)

7. Admitting in evidence and reading to the jury the stenographic report of the remarks of said Herman B. Smith at that meeting and other evidence of what took place at that meeting of July 3, 1917, although none of the other defendants were present at that meeting or in any way connected or related to it. (Tr. pp. 47, 48, 49, 50, fols. 79 to 83.)

8. Refusing to strike out each piece of said evidence at the close of the government's case when the government had failed to connect the other defendants with either the defendants Herman B. Smith or David J. Smith, both of whom appeared throughout the trial as their own separate counsel; had failed to connect any of the other defendants with the Socialist party; had failed to connect any of the other defendants with any of said meetings, or with anything said or done at any of those meetings. (Tr. pp. 88, 89, 90, fol. 146.)

9. It also was, and is, plain prejudicial error for the District Judge in his charge to the jury to quote from and emphasize portions of that speech of Her-

man B. Smith delivered on said July 3, 1917, and instruct the jury to consider it against all the defendants.

X.

THE SECOND OVERT ACT.

On August 4, 1917, the defendant Thomas Carey, and another person *not now a defendant,* having been notified to report for examination on August 6, 1917, filed with the local boards a claim of exemption called by the Government in the record, and others the "O'Connell Claim of Exemption", and at the same time told the local board that they would be present for the physical examination August 6, pursuant to their notices. There was no printed form or blank for such a claim of exemption. On August 6, they read in the newspapers an item from which they inferred that they would be arrested if they reported for physical examination on August 6, and on that date did not appear for physical examination, but afterwards another date was set for each of them, and each of them took the physical examination. The defendant Carey failed to pass the examination. *In their claims of exemption, they set up want of jurisdiction and unconstitutionality in the following language*:

> "I ....., Serial ..... not being now, and never having been in the military or naval forces, or service, of the UNITED STATES OF AMERICA, and not submitting to, or admitting, any *jurisdiction* in this board, or any other board or organization, or official, whatever, to in any degree draft, or conscript, me, into the military or naval forces of the United States; but specifically denying any and all such *jurisdiction* in this or any other board, or organization or official, *and objecting to any and all such jurisdiction, and for the purpose of resisting any claim that may*

be made hereafter, that my service, or property, or liberty, or life, is being taken from me by due process of law, or any claim of power, jurisdiction or authority to draft, or conscript me, into the naval or military forces or service of the United States, I make this particular form of claim of exemption at and from the start, setting up a few of the many grounds I have therefor, so that any appearance by me hereafter before any physician, or official, or board, or organization whatever, shall not be construed in any way an admission of, or submission to, your jurisdiction, or authority, BUT AS MERELY A MATTER OF COURTESY AND ORDERLY PROCEEDING FOR THE PURPOSE OF CALMLY AND LEGALLY PRESENTING AT THE PROPER TIME TO THE PROPER COURTS, to wit: the District Court of the United States, the United States Circuit of Appeals, and THE SUPREME COURT OF THE UNITED STATES, THE CONSTITUTIONALITY and lawfulness of any of the proceedings of the past, present or future in enacting or enforcing this draft or conscription law now sought to be enforced therefore:

I claim exemption from military service on the following grounds, to-wit:"

After specifying the various sections and articles of the constitution which he claimed were violated by the Selective Service Act, proceeded as follows:

"Later on, I shall present in my affidavit, in support of my claim of exemption, a more detailed statement of the facts and particulars upon which the foregoing claim of exemption is hereby made, and FOR THE PURPOSE OF LAYING THE FOUNDATION FOR TESTING ALL THE SAID RULES AND REGULATIONS, ORDERS, ACTS AND LAWS, I AM FILING

WITH YOU AT THIS TIME THE FOREGOING CLAIM OF EXEMPTION, and whenever there is the slightest danger to the United States or the Constitution of the United States no one will respond quicker or fight better or longer than I will and that without conscription or draft law, but [I am certain that notwithstanding all the humbug and lies published in the newspapers and other publications of the world, there is not and cannot be, the slightest danger to the United States, as this war is simply a war of aggression, conquest, and greed, on the part of England and her agents have secured a vote of Congress assisting them in this war, which vote was in violation of the Constitution, and will be reconsidered by the next Congress, who will have full power and express directions from the people.] The part in brackets was alleged in the indictment as the second 'overt act' ".

These claims of exemption were in typewriting. In all, six of these claims of exemption were filed with district boards. Carey and others filing the claims were born in Ireland.

Later for the defense at the trial, Carey and the other defendants *offered evidence tending to prove the truth of all statements made in the claim of exemption and that they were made in good faith, which offer was rejected by the court, and exceptions saved.* There was no evidence offered by the government as to the *falsity* of any of the statements made in the claim of exemption. *The foregoing is all the evidence of the second of the alleged "overt acts."*

XI.

QUESTIONS RAISED.

Among the questions involved in this appeal, and raised at the close of the government's evidence on the motion to quash the indictment, and again on the

motion to direct a verdict of acquittal; and again at the close of all the evidence on the motion to direct a verdict of not guilty, were, that this overt act was *lawful, innocent,* and that the statement was a *mere opinion;* and that Carey had the *right to make it;* and committed *no crime or offense in making it;* and that there was *no evidence whatever that he did it in pursuance of any conspiracy* set forth in the indictment; and he was protected by the First Amendment to the Constitution of the United States prohibiting any infringement of free speech, or free press.

2. It also was, and is, plain prejudicial error for the District Judge to quote said extract from said claim of exemption and characterize said extract as "calculated to create antagonism in the minds of those to whom it was furnished to the law in question and induce them to oppose and refrain from conforming to its requirements and thereby bring about obstruction to its enforcement, as only the persons who were *previously determined* to test the law were any given, and only six in all out of over 150,000 drafted from California.

The Court will probably take judicial notice that the same opinion and sentiments were at that time, and since, widely published in all the newspapers of the United States.

That the defendants, Carey, and the others, could in good faith believe the statements objected to in the claim of exemption were true, is shown by the following editorials published in the San Francisco Examiner, New York American and all the other Hearst newspapers and in other newspapers throughout the nation:

THIS SUBSERVIENCE TO BRITISH POLICIES IS BECOMING INTOLERABLE TO REAL AMERICAN FOLKS.

What do you think of this Washington dispatch, reprinted from the New York "Sun":

"WASHINGTON, Aug. 17.—In view of the fact that the League of Nations is not yet in operation, the British Government will deal with First Chief Carranza through the Government of the United States.

"There will be no attempt to anticipate the league by taking this American question out of American jurisdiction and asking European powers to dictate the policy to be pursued. Officials here expect the following steps to be taken by Great Britain the moment it becomes evident that Carranza is really placing British interests in jeopardy:

"First, Consultation with the Government of the United States as to the methods which Britain believes should be employed.

"Second, Speedy carrying into effect whatever policy the British decide upon after obtaining the tacit approval of the American State Department.

"Third, Dispatch of British warships to Mexican waters."

Now think a moment what that means.

The League of Nations—with six British votes to one American vote—not yet being in operation, the British Government has decided not to wait, but to send warships into American waters to take charge of Mexico.

The Monroe Doctrine not having yet been surrendered, on account of the obstinacy of a willful Senate, the British government will simply ignore it.

And what will the American government do about it?

Well, it will "tacitly approve of whatever policy the British decide upon."

Then what will happen?

The British government will dispatch a fleet to

the Gulf of Mexico and speedily carry into effect whatever policy it decides upon.

Now we want to ask you folks who are still all-American if anything more humiliating was ever proposed to the American nation?

What are we coming to—or rather, what HAVE we come to, that anybody in official Washington can have the hardihood and the impudence to let it be known that our Government contemplates turning over the policing of the American continent to Great Britain?

What is our America, anyhow? A little dog following at England's heels?

And what is this England, that gives us orders and takes command of our affairs?

Is it the same England whose envoys were in Washington exactly two years ago this very month, asking for our help, confessing that Germany had their empire and all their allies whipped, and beseeching America to hurry, hurry, hurry to their help before it was too late?

There seems to be quite a difference in the British government's tone at that time and this time.

The leading paper in London, some months ago, enthusiastically asserted that "the greatest living Englishman is Woodrow Wilson."

That made real Americans wince, but since Mr. Wilson ignored the affront, the rest of us kept quiet.

It is true that Mr. Wilson's parents and his four grandparents were British subjects. But he was born on American soil, and for that reason very few of us were willing to agree with the London paper that he was the greatest living Englishman or an Englishman at all.

But if with his consent and connivance the British government is to decide what shall and

what shall not be done with Mexico, is to give orders to our State Department, is to supersede our navy, and is to station a war fleet in American waters to make a state of the American continent a sphere of British influence, then a lot of us will begin to believe that American independence and the Monroe Doctrine are both dead.

The subserviency to England, the attitude of respectful obedience to her dictates, our docile compliance with and subordination of American principles to her imperialistic designs in Egypt, Africa, Persia and the Far East offend the deepest sensibilities of Americans.

The American people are getting very angry at them.

There won't be any Democratic Administration or any Democratic party after the next election if Mr. Wilson and Mr. Lansing turn over the conduct of Mexican affairs to British naval commanders and British diplomatic agents.

Surely the shameful tendencies of our public policies asserted in this Washington dispatch ought to strengthen the opposition of you Senators who are standing up for American independence, American sovereignty and the everlasting rule of the Americas by Americans.

Why don't you take the bull by the horns, knock the whole abominable and wretched treaty into a cocked hat, declare the United States at peace with Germany—as it is in all but form—and tell England and all Europe that we Americans have decided to return to and to be guided by the policies of George Washington, Thomas Jefferson, James Monroe and every other President of the United States with the single exception of Woodrow Wilson?

Do it, Senators, do it!

The whole country will cheer you if you do.

THE SELF-RELIANCE OF THE UNITED STATES OUGHT TO BE REASSERTED.

The London Daily Graphic says:

"Had it not been for the endurance and sacrifices of the Allies, the Monroe Doctrine would not be much today besides a sweet memory controlled by Germany. That being the case, why shouldn't America make some sacrifices in return for the Allies' services."

This stuff has a familiar sound. We used to hear such patriots as James M. Beck, George Haven Putnam and other serviceable British hornblowers delivering themselves of that kind of tommyrot. But, really, we thought this gentry had realized that their day was over.

We will tell the London Graphic and all its kind, abroad and at home, a few plain, matter of fact truths.

There never was a day nor an hour when this America of ours stood in the slightest danger of subjugation by Germany.

The German Imperial Government never saw an hour or a day when it could have whipped America, or when it would have risked the effort.

There never was an hour or a day when Germany would have had anything to gain by war with the United States.

There never has been an hour or a day since the German Empire was founded in 1871 when the United States Navy was not more than able to beat the German navy and to defend our costs from the landing of a German army—not a day, not an hour, not a minute.

No one nation in the world could whip us.

No TWO nations in the world could whip us.

The whole world together could not subjugate us. Why? Because the products of our soil, the

vast extent of our territory, make us a self-sustaining nation—unconquerable FROM WITHOUT.

We cannot be made the victims of blockade.

Our coasts are too long to be blockaded. And, if they could be blockaded, we have IN OUR OWN LAND everything we need to make war and to feed our people.

The German people numbered about 65,000,000 when the war broke out; the whole territory of the empire was 60,000 square miles—less than that of the single State of Texas; the country had no natural defensive boundaries of seas or mountains; it was surrounded by implacable enemies; it had an insignificant sea coast; it could not grow enough food to feed its population.

The American people number 110,000,000; they occupy a territory more than ten times the extent of the German Empire; the soil is fertile, the climate of every variety, the mineral and fuel resources inexhaustible, the people intelligent and inventive; there are enough young men to keep the army and navy at a numerical strength above 10,000,000 for an indefinite time; the country is gridironed with railroads and waterways; the distances are so vast that the whole German army, in its full prime, could not provide enough troops to maintain lines of communication across it, let alone maintaining a fighting, subjugating force.

To talk of Germany crossing three thousand miles of sea and subjugating our huge country and our enormous fighting population is to talk foolishness.

Certainly no Government that ever reigned in Berlin dreamed of undertaking such a hopeless task.

It is true that Germany did for four years make successful war against France, England, Italy

and Russia, with their minor allies, though these four powers outnumbered the Germans three to one in man-power and naval power, and much more than that in money-power. But Germany accomplished that tremendous military feat because she lay in the center of the ring of enemies and could strike first here and then there, and because the German armies were better trained.

But what earthly good would her armies or her generals have done her in war with America when she had no conceivable way of landing those armies in America, or of keeping open sea communication lines had she been able to land an army on our soil?

We say again that there never was a minute when we were in any danger at all from any attack Germany might mediate, except the vast effort and terrible cost of having to beat off such an attack, and no German high Command, in its wildest dreams, ever thought that it could subjugate America.

The Allies made NO SACRIFICES for America. Not a sacrifice.

The Allies were entirely too busy trying to hold Germany back to think anything about America, except to hope and pray for her aid.

Nor did America need their sacrifices or their help.

We always have been and we are right now perfectly capable of taking care of our own United States.

We are not looking for trouble, and we don't fear any nation or alliance that is looking for trouble. If they insist upon having it they can have it—lots of it. And they won't come looking for more in quite a while. Depend on that.

We don't owe England or any of the Allies a

thing. Not one thing. Not a dollar. Not a sacrifice. We have done our full duty.

We understand that the British Government has demanded—and got—over $80,000,000 from the United States for carrying across the Atlantic the American soldiers who turned British defeat into a very profitable British victory. It is right that we should pay for own war, but it is not right that we should go on paying for the twenty or more wars of other nations that still continue in Europe, Asia and Africa, after the defeat and surrender of our only two enemies.

Ten to one the people are sick of this whole greedy, grasping, impudent European outfit.

They have had enough of European gratitude and European intrigue to last them all their lives.

We tell the London Graphic and all its kind in Europe, as well as here at home, that our America is ready and able to defend itself at any time against Germany or any other nation; that our people won't yell for help, either, when compelled to fight; that they repudiate with indignation any assertion that England or anybody else ever saved them from conquest and subjugation by Germany.

And as far as taking care of the Monroe Doctrine or anything else American is concerned, we don't need any help, don't want any help and couldn't accept any help.

Americans will take care of America as they always have. Nobody need worry about that.

XII.

THE THIRD OVERT ACT.

On August 1, 1917, the defendant Daniel O'Connell, was requested by a minister of the gospel having a church at Lodi, Cal., to come to Lodi, and speak to his parishioners and others who were interested in the

constitutionality of the draft act, and wanted to test it, *and had asked him so many questions that he could not think of them all, and the best way would be for Mr. O'Connell to come to Lodi, and answer their questions, about the constitutionality of the draft act;* the minister and his parishioners having heard of the American Patriots. Mr. O'Connell consented to go and afterwards was visited by a committee of the parishioners, and August 4, 1917, was the date set for Mr. O'Connell to go to Lodi, Cal., and talk to them, *and answer their questions.* On August 4, 1917, at Lodi, Cal., Mr. O'Connell made a speech to those persons, and others, on the constitutionality of the draft act, and *answered questions then and there propounded to him from the audience. Some of the questions being insulting and impertinent, and others not.* Among the *questions* asked was, "Who do you want to win the war?" *To which question Mr. O'Connell made substantially the following answer:* "What do you mean by winning the war? I cannot see how anybody can win; there never was a good war and never was a bad peace, and if they went on piling up all our young men dead, he did not consider that winning. (Fol. 97.) Every intelligent person here knows that these young fellows who go across the ocean will never come back. We know that the average life in the trenches is about 48 hours. I wonder if it is 48 hours with those machine guns on both sides throwing bullets so fast that when a man throws up his head he is gone, and when they stick up their bodies to run across 'No Man's Land' to the other trenches, you wonder how they even last 48 hours in the trenches. Everyone of these young men who go will never come back—there may be some who may, but we don't know."

Mr. O'Connell also in answer to other *questions then and there propounded to him from the audience,* stated that he expected that there would be a large number of cases going TO THE SUPREME COURT

OF THE UNITED STATES, that they were already testing it in New York, and other cities, and that they would go direct to the Supreme Court of the United States for its determination, that ablest counsel in the United States would probably argue it, and that it would take about $5,000 to get the record in shape to present the question from California before the Supreme Court of the United States for a decision, without paying Mr. O'Connell anything. To an interruption, that before they got the decision the boys would be over fighting in France, Mr. O'Connell answered that *he had more confidence in the Supreme Court of the United States than his questioners had, and that he expected a decision from the Supreme Court of the United States within three or four months.* He also quoted from Daniel Webster, Hannis Taylor, and others to the effect that the draft act was unconstitutional, so far as taking the troops over to Europe to fight was concerned, and that that was not a war of defense, and that a draft act could only be constitutional when it was for purposes of defense, but the cases could be taken, and would be taken singly or collectively before the Supreme Court *without delay* for decision. *He also stated and advised in answer to questions, that everybody should take the physical examination and follow the law, and take every step required by the law. That if they were determined to test the constitutionality of the law* then they must not sign any papers or take the oath that would put them in the service, as that would make them subject to the military courts, and military law, as enlisted men, and that they could not appeal to the civil courts *for the purpose of testing the constitutionality of the draft act.* That they would either be in jail or out on bail while the test cases were pending, and that if they were arrested by the military authorities, then the remedy would be to apply to the civil courts for a writ of habeas corpus, *in order to test the constitutionality*

of the draft act. HE ALSO SAID IT WAS THE DUTY OF EVERY PERSON WHO BELIEVED IN THE CONSTITUTIONALITY OF THE DRAFT ACT TO ENLIST, AND THAT ALL THE NEWSPAPER MEN, AND MAGAZINE WRITERS, AND OTHERS WHO WERE CLAMORING FOR THE WAR SHOULD BE FORCED TO GO INTO THE WAR. A transcript of Mr. O'Connells speech was marked as Government's exhibit, but *not offered in evidence by the Government and the Government objected to the defendants putting that transcript in evidence,* and it was never read to the jury. *The going to Lodi* was the third overt act charged in the indictment.

XIII.

QUESTIONS RAISED.

Among the questions involved in this appeal, and raised at the close of the government's evidence on the motion to quash the indictment; again on the motion to direct an acquittal; and again at the close of all the evidence on the motion to direct a verdict of not guilty, were, that the charge of Mr. O'Connell going to Lodi was *innocent and lawful;* that he went there at the special request of *members of the corporation of which he was the attorney;* that whatever he said there *was privileged between counsel and client;* that whatever he said there was *protected under the provisions of the First Amendment to the Constitution of the United States* prohibiting Federal interference with free speech and public assemblage; that *his speech must have been highly patriotic and proper, as the best evidence of it was not introduced by the government and the government moreover objected to the defendants introducing that stenographic report procured by the defendants;* that *the only thing objected to by the government were the impromptu answers* given to questions, impromptu or prepared, secret

service men being in the audience, *but which answers could not be in pursuance of any conspiracy as Mr. O'Connell did not, or could not, know what questions were to be propounded;* that any outsiders intruding into the meeting and asking insulting questions at least 25 questions being asked and answered, they could not complain of the answers received, especially of *only a part of one of those twenty-five answers;* that the part of the answer complained of was *necessarily a mere opinion, or guess, or argumentative,* and what *had been widely published in newspapers and magazines;* the questions *calling necessarily for opinions and under the circumstances necessarily impromptu, it necessarily could not be in pursuance of any previous design or conspiracy* as alleged; it plainly was an argument to show the seriousness of war and to justify the impromptu answer to the insulting question of some outsider who was NOT there to consult or ask about the constitutionality of the draft act, *which is the only purpose, on the undisputed evidence, for which Mr. O'Connell was requested to go to Lodi, or for which he went, or which any other person was invited to attend,* and *only members of the American Patriots, corporation, were invited to attend,* and it could not be said answering impromptu insulting questions was *in pursuance of MR. O'CONNELL'S PURPOSE IN GOING THERE.*

2. It also was, and is, plain prejudicial error for the District Judge in his charge to the jury to pick out and quote erroneously certain statements made by Mr. O'Connell at Lodi and omit certain other portions of his statement which gave a different meaning to what was said than that stated by said District Judge to the jury.

XIV.

THE FOURTH OVERT ACT.

The minister of the gospel, Rev. W. C. Mengedoth, a

government witness, *found an incomplete triplicate copy of the legal opinion and advice on the constitutionality of the draft act, answering questions. It was incomplete, and the typewriting had been interlined and revised in various ways in handwriting, when about August 1, he found it on a desk in one* of Mr. O'Connell's offices, *or the adjoining office, he was not sure which,* and took it home with him late at night, *did not show it to anybody,* it being so late, and he had not time to show it to anybody, *and afterward returned it to Mr. O'Connell. The opinion had been delivered to the public stenographer by Daniel Yost, another lawyer, not Mr. O'Connell, to be typewritten, that lawyer used the same reception room as Mr. O'Connell and had the adjoining office.*

Mr. Yost was one of the advertised speakers at the Dreamland Rink July 3, 1917 (Tr. p. 47, fol. 78) and Mr. Yost spoke at that meeting and was interested in the meeting for organizing American Patriots July 11, 1917, and attended that meeting and took up a collection there, which meeting was held for the purpose of having a referendum or recall on the draft act, and at which meeting there was a general discussion of the constitutionality of the draft act and two of the alleged incorporators had called at his office the day before in consequence of his speech of July 3, 1917, and he took them into Mr. O'Connell's office and they were invited to attend the meeting of July 11, 1917. (Tr. p. 77, fols. 125-126.) The Articles of Incorporation of the American Patriots were signed in Mr. Yost's office, in his presence and under his direction in the absence of Mr. O'Connell, his office being next to Mr. O'Connell's, they both using the same reception room. Mr. Yost did not sign because he had a German name. (Tr. p. 83, fol. 135.) Mr. Yost first told two of the incorporators that there was to be the meeting of July 11, 1917, these incorporators heard

Mr. Yost's speech of July 3, and one of them had one son liable to the draft act. (Tr. p. 85, fol. 138.)

The only other evidence offered by the government in relation to the legal opinion was in the testimony of the government witness W. A. Gray, an alleged accountant, who was opening a set of books for the treasurer from August 2 to August 11, 1917, but was also acting in consultation and under direction from the Bureau of Investigation of the Department of Justice, although he was a close friend of the man who employed him, the defendant, E. R. Hoffman. (Tr. p. 65, fol. 107) and the only testimony he gave on the subject was the following: "I saw one copy on the desk, and one copy in the drawer of the desk of the legal opinion and advice on the conscription law; one I believe had the seal of the American Patriots on it." (Tr. p. 64, bottom of page.) There was *no evidence whatever* that the incomplete *legal opinion put in evidence* was a copy, or the same, as that found in the office of the American Patriots.

The foregoing was *all the governmental evidence* on the fourth alleged overt act.

XV.

QUESTIONS RAISED.

Among the questions involved in this appeal, and raised at the close of the government's case, on the motion to quash the indictment; and again on the motion to direct an acquittal; and again at the close of all the evidence on the motion to order a verdict of not guilty, were, that there was *no evidence whatever that Daniel O'Connell PREPARED that opinion; no evidence that he ever caused it to be distributed;* and *no evidence that it ever was distributed at any time,* by anybody.

XVI.

In that incomplete legal opinion it was stated that

the draft act was unconstitutional, and answered various questions in reference to it. Among the questions and answers were the following:

"Q. Will they report to exemption or examining boards?

A. As the boards might have them take the oath or sign some papers putting them in the military service, the safest way is not to go, but simply file an affidavit of exemption, *as the best and safest way of testing the law.*

Q. If they refuse to go are they under military law?

A. No, they are not.

Q. Can the military authorities proceed against them?

A. No. Also, if the law is declared constitutional, then the worst that can happen is that the defendants will have to serve a year in jail."

In contradiction of the foregoing, the government witness testified that Mr. O'Connell told all to "report to the exemption or examining boards" and all other boards and register, take the physical examinations and do everything that the law required, "follow the law in every step" and sign every paper requested to sign, except *if they were to test the law* they must not sign any, or take the oath that would put them in the army as an enlisted man. *All of which is contrary to that quoted from that incomplete opinion.*

XVII.

QUESTIONS RAISED.

Among the questions involved in this appeal, raised at the close of the government's case, on the motion to quash the indictment, and again on the motion to direct an acquittal, and again at the close of all the evidence, were the following:

1. The said incomplete legal opinion put in evi-

dence and quoted from was not shown to be the one used or in the office of the American Patriots, and not Mr. O'Connell's opinion, and not prepared or adopted by him, but in all probability Mr. Yost's incomplete opinion.

2. It also was, and is, plainly prejudicial error for the District Judge to instruct the jury as follows: "Among other documents which the evidence tends to show were *put out and furnished by the defendants through the American Patriots* and those in its employ *to people who came to its office* was a so-called legal opinion *admitted to have been prepared by the defendant O'Connell, a copy of which* has been put in evidence." (Certiorari Record p. 9, sub. III, and Amended Assignment of Errors p. 8, sub. III.)

XVIII.

OTHER EVIDENCE OF THE GOVERNMENT.

The other evidence offered by the government proved that *all the persons who joined the American Patriots declared their settled positive opinion that the draft act was unconstiutional, and joined the American Patriots simply for the purpose of testing that constitutionality, as they were unable to defray the whole expenses themselves. All of them testified that they were not influenced in their opinions or their actions in any way by the American Patriots, or its literature, or anything said or done by the corporation or any of the defendants and that long before they ever heard of the corporation, or any of the defendants, they had determined to test the constitutionality of the draft act. They also testified that if it was decided constitutional they would immediately enlist and would not have to be drafted,* but that if it was unconstitutional, they would not want to go to Europe to fight, although they were ready and willing to fight *in this country. They all testified that*

obstructing the draft or recruiting, or enlistment was never mentioned or heard of or thought of by them or any of them, and that the sole and only purpose they had in view was testing the constitutionality of the draft act. They also testified that they never directly or indirectly tried to influence anybody else not to enlist or be drafted, or in any other way refuse to obey the call to the colors.

XIX.

For the purpose of securing members and raising the money, circular letters were sent out through the mails, and otherwise, and patriotic appeals were to be thrown on the screens in a number of moving picture theatres in San Francisco, and a wagon was driven through the streets August 6th, 1917, on three sides of which was the following inscription: "John Bull is ruling and ruining us. What are you doing about it? Join the American Patriots, 714 Mechanics Bank Building." The advertisement to be put on the screen in the moving picture theatres, had Trumbull's famous picture of the signing of the Declaration of Independence, surrounded by portraits of George Washington, Thomas Jefferson, Samuel Adams, Patrick Henry, James Otis, Daniel Webster and topped by an American eagle with an American flag on both sides of the eagle, and under which was this inscription: "Let all men who mean to die as they live, citizens of a free country, stand together for the supremacy of the laws." —Daniel Webster, in United States Senate, March, 1834; and on the same day the Senate passed a resolution presented by the great Henry Clay declaring 'that the President has assumed upon himself authority and power NOT CONFERRED BY THE CONSTITUTION AND LAWS, BUT IN DEROGATION OF BOTH.' You swore to preserve and maintain that Constitution. Will you join us and save it? American Patriots, 714 Mechanics Building."

The circular letter had the same inscription and pictures at the top as were to be thrown on the screen in the moving picture theatres, and then proceeded as follows:

San Francisco, Cal., 1917.

Dear Sir or Madam:

Your good thoughts, intentions, and enthusiasm, have little effect unless followed by action. *The necessary work and expense is too great for individuals, therefore co-operative organized action is necessary.* The American Revolution was fought, won, and the Republic established, by "Sons of Liberty", an organized minority, in spite of the opposition of Tories, grafters and grovelers before wealth and office, in those days, assisted as they were by the purchased press, suppressing the truth and publishing lies, for the purpose of scaring or humbugging the people. At present all that these American heroes fought for and won is in extreme danger of being lost. *To save the Republic we have therefore organized the AMERICAN PATRIOTS—the name alone covers everything sufficiently—and as evidence that we mean business, we incorporated under the laws of the State of California, July 14, 1917,* and as the objects and purposes of the corporation, filed with the Secretary of State the following statement:

"To defend, maintain and enforce the letter and spirit of each and every provision of the Constitution of the United States, and the Constitution of California.

"To challenge and test in the courts each and every Act of Congress and the executive department which violates said Constitution.

"To test the constitutionality of the so-called draft or conscription act now sought to be enforced.

"To test the constitutionality of every act of

the executive and legislative departments forcing any person in the land or naval forces of the United States to render military services in Europe.

"To amend the Constitution of the United States so that war can never be declared except by vote of at least two-thirds of the registered voters of the United States.

"To amend the Constitution of the United States so as to incorporate therein the initiative, referendum and recall substantially as contained in the Constitution of California.

"Neither profit, nor profit sharing, nor dividends, nor dividend sharing, nor any financial gain to any of the members, or otherwise, shall ever be any of the objects of this corporation."

It is plain from the above that members of AMERICAN PATRIOTS must be real, genuine patriots, not humbug or "shoneen." No matter where you or your ancestors were born, *if you are now an American citizen and a real patriot,* you are requested to join us at Room 714 Mechanics Building, Cor. Market and Mason Streets, San Francisco.

Yours sincerely,
Daniel O'Connell, Pres.
Margaret Malloy, Secty.

The regular meetings of the corporation, and one mass meeting August 21, 1917, and the said film production contract circular letters, and the "O'Connell claim of Exemption" herein mentioned, were the kind of, and the extent of, the activities of the American Patriots.

XX.

On August 6, 1917, defendant Daniel O'Connell, was arrested and taken from the platform in a large hall after he had concluded a speech at which meeting

United States Senator John D. Works, David Star Jordan and other public men were present at the time of the arrest, and at which meeting of the Peoples Council of America they also made speeches. At the same time on August 6, that horse and wagon were arrested and taken off the street.

XXI.

CLOSE OF THE GOVERNMENT'S EVIDENCE.

At the close of the Government's evidence the defendants moved the Court to strike out the various portions of the evidence hereinbefore mentioned; and also moved to quash the indictment, and direct a verdict of not guilty, on various grounds, and those *not disposed of by subsequent decisions of the Supreme Court of the United States,* are the following: (Tr. pp. 94-99.)

1. All the evidence for the government *if assumed true in fact with all reasonable inferences therefrom is not legally sufficient to support a verdict of guilty.* (Tr. p. 94.)

2. The allegations and facts as set forth in the indictment, and in each of the first and second counts of the indictment are not sufficient to constitute an offense under the Constitution and laws of the United States for each and all of the specific grounds and reasons set forth in the demurrer of the defendants to the said indictment and counts, which demurrer has been heretofore filed and overruled and which is hereby referred to and made a part of this motion. (Tr. p. 95.)

3. Sub. L. (Tr. p. 97.) The Congress knew that the United States having been forbidden to legislate on the subject of free speech, free press, and peaceable assembly, or to abridge the peoples' freedom in each, that therefore full and supreme power over those subjects remained in the several States and Congress

could not, and cannot, in the slightest degree, interfere with the States, or the State's laws on the subject, and therefore in using the word "obstruct" never intended that they should include, or mean, "induce and persuade."

M. The Congress knew that the State of California had completely covered these subjects in the Constitution of the State, which law is beyond the power of the United States to interfere with in the slightest degree, and if the word "obstruct" were construed to mean "induce and persuade", then they would interfere with the following provisions of the said Constitution of the State of California:

"*Every citizen may freely speak, write and publish his sentiments on all subjects,* being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." Sec. 9, Art. 1, Const. of Cal.

"The people shall have the right to freely assemble together to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances. Sec. 10, Art. I. Const. of Cal. See People vs. Seeley, 139 Cal. 118; Daily vs. Superior Court, 112 Cal. 94." Sects. 1, 2, Art. I. Const. of Cal.

Therefore the Congress never intended to interfere with these expressions of the Constitution of California, *and if they did,* their *attempt* would be void and of no effect. (Tr. p. 97.)

N. The Congress never intended to make, as it had no power to make and was also prohibited by the Constitution of the United States from making the "persuading and inducing" as alleged in the indictment, a criminal offense; and the offering evidence of such "persuading and inducing" could not prove, or tend to prove, the crime alleged in the indictment, and the allegations of inducing and persuading are repugnant

to the other parts of the indictment as well as the statute.

O. The subject matter of "persuading and inducing" was, and is, entirely in the jurisdiction of the State of California, and the State of California has acted thereon in the Constitution of the State; and the Congress of the United States could not legislate upon the subject. They did not intend to, and this is more repugnance.

P. To hold that such allegations constitute a crime would be contradictory of, and violate the provisions of Sections 1, 9, and 10 of Article I of the Constitution of California which is the supreme law on the subject.

4. There was *no evidence* offered or admitted of *any conspiracy charged* in either the *first or second count* of the indictment.

5. None of the *acts* charged as overt acts were *proved as overt acts in pursuance of any conspiracy charged in either count of the indictment.*

6. The *strongest construction of the evidence* against the defendants could not make such evidence any more than *an agreement* and understanding between persons *to test the constitutionality of the draft act,* or *acts of the legislature* or *executive departments of the government,* which agreement or understanding could not be an offense against the United States, as it is also protected by Section 37 of the Penal Code of the United States.

7. *Such an agreement or understanding could not possibly be construed into an obstruction* or *conspiracy to obstruct or evade any law of the United States.*

8. *All the evidence offered* is, of circulars and other *printed matter* circulating among the people; and also of *speeches at public assemblies* in which acts of the *legislative and executive departments* of the government were *considered;* and conversations be-

tween attorney and clients on constitutional and other legal questions and on advice as to the best method of protecting the legal rights of the client, especially his property, liberty and life from what he considered unauthorized acts of officers of the government, and also conversations between the President of a corporation and the members of the corporation on the same subject and for the same purposes, *and Congress has no* power to legislate on such subjects; and is also *prohibited* from abridging the rights of peaceable assembly, free speech, and free press and *cannot indirectly, or by construction do that which it has no power to do,* and *is directly forbidden to do.* (Tr. p. 98.)

9. The State of California, in its Constitution has fully legislated on these subjects of assembly, speech and the press, and has supreme *plenary and exclusive* power to legislate on these subjects. The *conspiracies* charged in the indictment *require* that the defendants must commit an offense *which could be carried out ONLY by violating the laws of the United States.*

Wilson vs. U. S., 190 Fed. 427;
Fain vs. U. S., 209 Fed. 525;
U. S. vs. Biggs, 211 U. S. 507.

Only the laws of the State of California COULD BE violated by ANYTHING DONE IN PEACEABLE ASSEMBLY, OR BY WAY OF SPEECH OR OF THE PRESS.

10. *There is no evidence whatever* of "the making of *any false statement or certificate* as to the fitness or liability" of any of the defendants or of any other person for service under the provisions of the Act of Congress of May 18, 1917, or regulations made by the President.

11. *There is no evidence of "the union* of two or more persons, the *conscious participation of two or*

more minds, which is *indispensable to the conspiracy.*" The evidence is only of facts as consistent with innocence as with guilt. There is no substantial evidence of *facts which exclude every other hypothesis but that of guilt; all the substantial evidence is as consistent with innocence as with guilt.* Union Pacific vs. U. S., 173 Fed. 740."

These motions were denied, (Tr. p. 88, fol. 143), and *similar motions were also made at the close of all the evidence* and denied. (Tr. p. 172, fol. 270.)

The evidence offered by the defence did not corroborate any evidence offered by the government, but did *contradict and explain the evidence offered by the government.*

XXII.

COMMENT ON GOVERNMENT'S EVIDENCE.

1. There was *no charge or evidence,* of *attempting to create insubordination, mutiny, etc.* There were at least 120 members of the American Patriots whose names were in the record delivered to and known to the government (Tr. p. 38, fol. 65) and at least 5 of whom, other than the defendants were indicted with the defendants, and those indictments subsequently dismissed as to them, Rev. W. C. Mengedoth (Tr. p. 33, fol. 57), John Murphy (Tr. p. 42, fol. 72), Mrs. Manley (Tr. 76), Mrs. Malloy-Krauss (Tr. p. 85, fol. 138), Christopher McCullough (Tr. p. 82, fol. 133), so that *a mere membership,* in the American Patriots was not considered a criminal conspiracy, or a violation of any law.

2. It was so everwhelmingly *proved* by the defendants by government witnesses that there was *no secrecy* about their *meetings, and actions, and that all were open and above board, that the government finally admitted the fact.*

3. It was so everwhelmingly *proved* by the defendants by government witnesses that Mr. O'Connell in

all his speeches and declarations stated that all who wanted to enlist *should enlist;* that it was the *duty of all* who believed the draft act constitutional and not going to test it in the courts, *to enlist;* that all the newspapermen and magazine writers and other persons who were clamoring for war, *should be forced to go to war first; that all should register and take the physical examination, that the government was finally forced to admit that such were his declarations and speeches at all meetings.*

4. The want of any evidence of any conspiracy, or even attempt to advise, or induce, or *persuade,* anybody not to register, *or report for physical examination, or to be physically examined,* was so complete that the Judge of the District Court was obliged to state in open court that on that charge there was "absolutely no evidence." (Tr. pp. 91, 92, fols. 148, 149.)

5. There was therefore absolutely *no evidence* to prove the allegations in the *first count* of the indictment of a conspiracy to obstruct *recruiting and enlistment,* as everybody was advised to enlist and told it was their *duty to enlist if they were not going to test the constitutionality of the draft act.*

6. The only *claim* of obstructing, or inducing and persuading to obstruct, was in advising those members of the American Patriots *who were determined to test* the constitutionality of the draft act, *not to take the oath or sign the roll that would put them in the military service, as then they were enlisted men and subject to military law and military courts, and could not appeal to civil courts.*

7. *Neither directly nor indirectly* by reason of anything said or done by the American Patriots, or any of the defendants was there the slightest *obstruction to recruiting, or enlisting, or any part of recruiting, or enlisting, or any evasion, or attempt at evasion, of the draft act, or any of the duties under the draft act,*

by any person outside of the corporation, American Patriots.

8. The *speeches* of Mr. O'Connell although *fully reported and transcribed* by stenographers were not put in evidence, and *objections* were *made by the government to the defendants putting them in evidence, which settles the fact that nothing said in the speeches violated any law, or was evidence even tending to prove the allegations in the indictment.*

9. There was *no evidence* that the claims of exemption, or the statements therein were ever *distributed;* and only *nine persons* ever received any. *Those nine persons were members of the American Patriots, and each was previously of the opinion that the draft act was unconstitutional and determined to test its validity by carrying a test case to the SUPREME COURT OF THE UNITED STATES; and received the claim of exemption for the purpose of filing it with the district board for the purpose of raising the question of the Constitutionality of the draft act, at the first stage in the proceedings.*

10. In the American Patriots *only eight persons filed* the "O'Connell claims of Exemption." Of those eight two are defendants. Of those two defendants one failed to pass the physical examination, and the other failed to pass the first examination, and was then accepted on the second examination, and both are prosecuting this appeal. Of the remaining six persons one failed to pass the physical examination; two others were arrested, Mettler and Donlan, and so far as the record in this case goes *were taking measures to test the constitutionality of the Draft Act in the SUPREME COURT OF THE UNITED STATES.* The record shows that two of the others were arrested *before they were notified to appear, why, has not appeared, other than for merely filing the claim of exemption* and the eighth and last man it

does not appear from the record what happened to him. *All registered, took the physical examination, obeyed every order and call except the last call or notice,* which was disobeyed by two *for the purpose of testing the constitutionality of the draft act.* They were all members of the corporation.

11. *The first claims of exemption were prepared for, and filed by,* three members, August 4, 1917, each of whom was born in Ireland, (defendants Thomas Carey, John Murphy, and Michael Donlan), they insisted upon the reasons being inserted in their claim of exemption that they were determined never to fight for England and had a profound hatred of England, but a love for the United States, and were ready to fight for the United States. (Tr. pp. 42, 43, fol. 72; pp 163, 164, fol. 120; pp. 165, 166), *plainly for the purpose of stating their own personal motives* so that their *loyalty to the United States would not be questioned, and not for the purpose of influencing anybody else. CERTAINLY NOT IN PURSUANCE OF ANY CONSPIRACY.*

12. It appears plainly that in the hurry *those forms were copied* because they were ready and not for the purpose of distribution and *not for the purpose of influencing anybody else.*

13. *No evidence* whatever was offered to show that those were *false statements.*

14. It is plain that they *believed them to be true and were made in good faith.*

15. Evidence of their truth was afterwards rejected.

16. *The opinion put in evidence was not the opinion used by the American Patriots,* or prepared *by Mr. O'Connell. The only persons,* on the evidence who ever saw *the legal opinion put in evidence,* were the attorney, Daniel Yost, who was also preparing for a test case, and gave it to the stenographer and the

stenographer who made a few typewritten copies and returned them to Mr. Yost, Rev. Mr. Mengedoth, who *picked it up from a desk* in Mr. O'Connell's office *or the adjoining office occupied by Mr. Yost,* and Mr. O'Connell to whom Rev. Mr. Mengedoth *afterwards delivered it,* and who produced it in court when called for. The opinion in the possession of the American Patriots and delivered by Mr. O'Connell to the assistant secretary was *in the office* at the American Patriots in the *drawer* of one of the desks for the use of the treasurer of the corporation. The only other persons who *saw* it were "peeping Toms", or secret service men, or a few members of the American Patriots to whom the assistant secretary, a boy of 16 years of age, showed it, *violating his instructions in doing so.* There was no evidence of what *it* contained or whether *it* was the same, or substantially the same, *as the one put in evidence. It* was prepared by the *attorney and legal adviser of the corporation in answer to various questions put to him by members of the corporation* and only members of the corporation were given any legal advice. Three of the six defendants never saw *any* legal opinion, *and only the secret service person, Gray, and five other known persons ever saw the legal opinion of the American Patriots.* Four of those were members of the American Patriots, and the other was a boy 16 years of age working in the office.

THERE WAS ABSOLUTELY NO EVIDENCE that a copy was ever "distributed" or delivered to ANYBODY. On the contrary the EVIDENCE WAS that no copy was ever "distributed" or delivered to anybody. Therefore the Judge's charge on this point was *directly contrary to the evidence.*

There was no charge of attempting to create insubordination, mutiny, etc. There were at least 120 members of the American Patriots whose names were

known to the government and at least 4 of whom, other than the defendants were indicted with the defendants, and those indictments subsequently dismissed as to them, so that a mere membership in the American Patriots was not considered a criminal conspiracy, or a violation of any law.

There was no evidence that the claims of exemption or the claims of exemption, or the statements therein was ever distributed; and only *nine persons* ever received any. Those nine persons were members of the American Patriots, and each was previously of the opinion that the draft act was unconstitutional and determined to test its validity by carrying a test case to the Supreme Court of the United States; and received the claim of exemption for the purpose of filing it with the district board for the purpose of raising the question of the Constitutionality of the draft act, at the first stage in the proceedings. The speeches of Mr. O'Connell although fully reported and transcribed by stenographers were not put in evidence, and objections were made by the government to the defendants putting them in evidence, which settles the fact that nothing said in the speeches violated any law, or was evidence even tending to prove the allegations in the indictment. The opinion put in evidence was not the opinion used by the American Patriots or prepared by Mr. O'Connell. The only persons, on the evidence who ever saw the legal opinion put in evidence, were the attorney, Daniel Yost, who was also preparing for a test case, and gave it to the stenographer and the stenographer who made a few typewritten copies and returned them to Mr. Yost, Rev. Mr. Mengedoth who picked it up from a desk in Mr. O'Connell's office or the adjoining office occupied by Mr. Yost, and Mr. O'Connell to whom Rev. Mr. Mengedoth afterwards delivered it, and who produced it in court when called for. The opinion in the possession of the American Patriots and delivered by Mr. O'Connell to the assistant secre-

tary was in the office at the American Patriots in the drawer of one of the desks for the use of the treasurer of the corporation. The only other persons who saw it were "peeping Toms", or secret service men, or a few members of the American Patriots to whom the assistant secretary a boy of 18 years of age, showed it, violating his instructions in doing so. There was no evidence of what it contained or whether it was the same, or substantially the same, *as the one put in evidence.* It was prepared by the attorney and legal adviser of the corporation in answer to various questions put to him by members of the corporation and only members of the corporation were given any legal advice. Three of the six defendants never saw *any* legal opinion, *and only the secret service person, Gray, and five other known persons ever saw the legal opinion of the American Patriots.* Four of those were members of the American Patriots, and the other was a boy 16 years of age working in the office.

It was overwhelmingly *proved* by the defendants that there was no secrecy about their meetings, and actions, and that all were open and above board, that the government finally admitted the fact.

It was so overwhelmingly *proved* by the defendants that Mr. O'Connell in all his speeches and declarations stated that all who wanted to enlist should enlist; that it was the duty of all who believed the draft act constitutional and not going to test it in the courts, to enlist; that all the newspapermen and magazine writers and other persons who were clamoring for war, should be forced to go to war first; that all should register and take the physical examination that the government was finally forced to admit that such were his declarations and speeches at all meetings.

The want of any evidence of any conspiracy or even attempt to advise, or induce or persuade anybody not to register or report for physical examination, or to be physically examined, that the Judge of the District

Court was obliged to state in open court that there was "absolutely no evidence."

There was therefore absolutely *no evidence* to prove the allegations in the *first count* of the indictment of a conspiracy to obstruct *recruiting and enlistment*, as everybody was advised to enlist and told it was their *duty to enlist if they were not going to test the constitutionality of the draft act.*

The only claim of obstructing, or inducing and persuading to obstruct, was in advising those members of the American Patriots who were determined to test the constitutionality of the draft act, not to take the oath or sign the roll that would put them in the military service, as then they were enlisted men and subject to military law and military courts, and could not appeal to civil courts.

Neither directly nor indirectly by reason of anything said or done by the American Patriots, or any of the defendants was there the slightest *obstruction to recruiting or enlisting, or any part of recruiting or enlisting or any evasion or attempt at evasion of the draft act or any of the duties under the draft act, by any person outside of the corporation, American Patriots.* In the American Patriots only eight members filed the "O'Connell claims of Exemption." Of those eight two are defendants. Of those two defendants one failed to pass the physical examination and the other failed to pass the first examination and was then accepted on the second examination, and both are prosecuting this appeal. Of the remaining six members one failed to pass the physical examination; two others were arrested, Mentler and Donlan, and so far as the record in this case goes were taking measures to test the constitutionality of the Draft Act in the Supreme Court of the United States. The record shows that two of the others were arrested before they were notified to appear, why, has not appeared, other than for merely filing the claim of exemption and the eighth and last

man it does not appear from the record what happened to him. All registered, took the physical examination, obeyed every order and call except the last call or notice, which was disobeyed by two for the purpose of testing the constitutionality of the draft act.

17. *From the facts it is plain that if the Draft Act was declared unconstitutional* there could not have been even a *claim* of a case, as the Draft Act would have been *no law*. Therefore the government's case must now rest on the contention, substantially made at the trial, *that as the defendants did not correctly anticipate the decision of the Supreme Court of the United States, then the defendants must be punished for having such a decided opinion as to organize a corporation to raise funds to have that opinion of the meaning of the Constitution tested and sustained in the Supreme Court of the United States.*

THE EVIDENCE IN THE CASE.

The sufficiency of the evidence, was questioned at the close of the government's case, and again at the close of all the evidence. In order to present the questions clearly so as to save the time of the Court, we will first divide into five divisions giving in each all the evidence bearing on each of the four alleged "overt acts" in the order in which they are charged in the indictment and the remaining evidence will be set forth in the fifth and subsequent divisions. *The government relied upon the evidence of the "overt acts" to prove the alleged conspiracies.*

Government's Evidence of Any Conspiracy.

All the evidence on causing "to be incorporated an association called the American Patriots." (Tr. p. 3, fol. 5; p. 5, fol. 9.)

Mrs. Julia Manley a government witness, testified that on July 10 or 11, 1917, she and Mrs. Krauss went to the office of Attorney Daniel Yost to meet him as he

had spoken at a Socialist meeting. That after talking with Mr. Yost he took them into the office of Daniel O'Connell and introduced them, which was the first time she ever saw Mr. O'Connell. They were informed that there was to be a meeting the next evening to form an organization, but the name had not been decided upon. The meeting was discussed and she promised to be at it, the next evening. At the meeting the next evening they talked of the various names, and Mr. O'Connell suggested American Patriots covering the whole thing, and shorter than the others suggested. There were about twenty people at the meeting and they were to meet the next day about noon to form the organization, and she supposed, to elect officers. She did not go to the meeting at noon the next day, and never saw Mr. O'Connell again until she saw him in court at the trial of this case. No papers were displayed and no signatures asked at that evening meeting. Mr. Yost had his office next door to Mr. O'Connell's. Mrs. Krauss informed her the next day that she had signed her name to the incorporation papers of the American Patriots. When talking about names Mrs. Krauss said her maiden name was Margaret Malloy, an Irish name, which would look better than her German name. She was in sympathy with the movement to repeal the draft act which she wanted repealed. She never had anything else to do with the organization. Nobody ever questioned her resignation. The first time she ever saw Mr. O'Connell was when Mr. Yost brought her and Mrs. Krauss into Mr. O'Connell's offices. The next time was in the assembly hall of the Pacific Building the next evening. At that meeting in the assembly hall there was a general discussion among the twenty odd people present, about the constitutionality of the draft law, and that Congress should not have the power to declare war without first having a vote of the people on it, and that the

constitution ought to be amended so as to have that provision in it, requiring a referendum first before declaring war. She took part in the discussion. Mrs. Krauss had two sons subject to the draft act. Mrs. Manley had no relatives of her own, but she was interested from a humanitarian standpoint, and did not believe in war. Before she left the meeting that evening it was understood that she was to be at Mr. O'Connell's offices the next morning about 11 o'clock to form the corporation, but she did not go. (Tr. pp. 76, 77, 78, fols. 124, 125, 126.)

Mrs. Margaret Malloy Krauss, a government witness, testified that she signed the articles of incorporation of the American Patriots in Mr. Yost's offices which are next to Mr. O'Connell's, they both using the same reception room. I knew Daniel O'Connell was to sign the paper with us. *I did not know who else was going to sign.* When I signed no one was present except Mr. Yost. I did not see Mr. O'Connell. There was a discussion about our signing the papers at the organization meeting the night before. When I wrote Margaret Krauss it was erased by Mr. Yost, he saying that Mr. O'Connell left word to sign Margaret Malloy. I understood that the organization was to be a political organization to work to repeal the draft law. There was also universal suffrage mentioned, and to test the constitutionality of various obnoxious laws; that was the discussion the night before; that is where I learned the purposes. I attended some meetings after that. I was present at the organization meeting when the officers were elected. I was elected secretary but I told Mr. O'Connell that I had poor health, and was going away, and must resign. *I don't remember seeing the Smiths there at the meeting when I was elected secretary, or at any of the meetings after that.* At the preliminary meeting on the night that the organization of the corporation was

talked about, I saw them. The minutes of the meeting of July 17 and July 21, 1917 were as follows: "At the meeting of July the 17th, with the approval of all persons Daniel O'Connell presides as temporary President and Margaret Malloy as temporary secretary, Mr. Herman B. Smith having declined to serve as secretary. The meeting was composed of four signers of the Articles of Incorporation and other persons eligible to membership. The temporary President first read the Articles of Incorporation. It was unanimously voted to proceed to the adoption of rules, regulations, and by-laws for the corporation. On motion made and duly seconded, the first regulation, rule and by-law of the corporation was adopted as follows:

> "All American citizens and persons who have secured their first papers on application for naturalization as American Citizens and *who sincerely believe in the objects of the corporation* and sign the roll of membership declaring such belief, are eligible for membership in this corporation and on so signing the roll become members of this corporation."

The second rule, regulation and by-law was unanimously adopted as follows:

> "The dues for membership in the corporation shall be 25c a month, commencing with the signing of the roll when the first 25c shall be paid.
>
> "On motion duly made and seconded, it was unanimously voted that the committee of three appointed at the first meeting July 12th, 1917, with full power to act, continue with said full power and conduct the affairs of the corporation until otherwise ordered by the corporation.
>
> "Upon motion made and duly seconded, and unanimously voted by the members, it was decided

to meet again on the night of Thursday July 19th, and Saturday July 21st at 8 o'clock in the Auditorium of the Pacific Bldg., and thereafter upon Mondays, Wednesdays and Saturday nights."

At the meeting of July 21: "Minutes American Patriots Inc., Meeting July 21, 1917. 'The meeting of the American Patriots, held Sat. Eve July 21st was regularly called to order. President Daniel O'Connell presiding. It was moved, seconded and unanimously voted that Attorney Daniel O'Connell President Pro Tem, be elected President.

"It was moved, seconded and unanimously voted that Miss Margaret Malloy, Secretary Pro Tem, be elected Secretary, also that the present Asst. to the Secretary Louis Serbin, be retained."

The witness continued her testimony as follows: "I am not positive if I saw the Smith boys at any meeting until after the papers had been made out. They may have been present at the meeting at which I was elected permanent secretary, and Mr. O'Connell permanent president. It seems to me the taller of the two was present. I never assisted in sending out letters; I never saw a mailing list. The latter part of July I ceased going to the meetings altogether. I resigned at the meeting as an officer, but was prevailed upon to come down. I was one of the defendants charged with conspiracy, but the case was dismissed against me. I never saw Mr. O'Connell until the day Mr. Yost introduced me to Mr. O'Connell, and that was the day before the preliminary meeting referred to. *I did not know there was to be such a meeting, until I called at the offices of Mr. Yost, that it was to be the next evening.* I have one son liable to the draft law. I went to the meeting at which Mr. Yost spoke at Dreamland Rink, several nights before this time, and went down *to his offices* with Mrs. Manley of my own volition. I had never seen him before that meeting at

Dreamland Rink, and never spoke to him before I came down to his office. *I was a member of the Democratic State Committee, and one of the Democratic electors at the presidential election, and took an active part in the campaign for the election of Mr. Wilson as president.* All my life I have been a pacifist. The first meeting was more of a social meeting, and Mr. O'Connell explained the purposes of the corporation, universal suffrage appealed to me strongly. Mr. O'Connell said we had it in California, and a California corporation could not have universal suffrage as we had it; I was under the impression that one of the main reasons why the corporation was being organized was to work for the repeal of the draft act, and to amend the constitution so that war could not be declared hereafter without first giving the voters a chance to vote on it, and that appealed to me, *and its constitutionality or unconstitutionality was to be tested in the courts.* I think Mr. O'Connell said a proposition to amend the constitution was to be submitted to the legislatures of the various states. At the first meeting Herman B. Smith was there and made some remarks. There may have been thirty or forty present; a lot of gray-headed men, and bald headed men were there, *and I thought it was conspicuous by the absence of the draft age man.* At the meeting after the charter was issued, David J. Smith, Herman B. Smith, Mr. O'Connell, and myself were present, and a large number of people came forward and signed the roll, and fixed the dues themselves that night at 25c. *A man named Boddil who somebody said that night was a Secret Service man, came forward and signed the roll, and Mr. O'Connell said he did not care.* At the next meeting the officers were elected. I can not tell how many persons were present, and Herman B. Smith, and David J. Smith, and David said that 25c would not pay expenses. After

that meeting headquarters were opened at Room 714, Mechanics Building. *At that meeting Mr. O'Connell was asked several times to state the objects and purposes of the corporation.* I said that my health was such that I could not act as secretary, but Mr. O'Connell asked me to continue. (Tr. pp. 83, 84, 85, 86, 87, fols. 135 to 141.)

The foregoing was all the evidence offered by the government on the formation of the corporation called the American Patriots, and of everything said or done prior thereto, *and of every kind of a communication between any of the defendants prior thereto,* and of any and every kind of a conspiracy, agreement, understanding, joint action, or purpose, between any, or all of the defendants.

EVIDENCE OF DEFENCE ON FORMATION OF CORPORATION—OR CONSPIRACY.

The defendants on this same subject, and this alleged overt act, offered the following evidence. Daniel Yost testified as follows: "I am an attorney at law, practicing in San Francisco. My offices are in the Pacific Building next to Mr. O'Connell. I remember during the last week in May, or the first week of June, people going to the office to consult about the draft act. Mr. O'Connell told them to register and then after that you submit to the physical examination, then the next move was on the part of the government. Mr. O'Connell answered them that they had no remedies in the Courts of California, that it was a national question under the national laws; that everything must be done legally; that they must register, submit to the physical examination, and the next move was on the part of the government, and if they were arrested their remedy was to sue out a writ of *habeas corpus.* (Tr. p. 124) This statement was made between the enactment of the conscription law and before June 5th. Mrs. Krause and Mrs. Manley *came in to see me* and

introduced themselves. They said they had attended the meeting at Dreamland Rink. Mrs. Krause said she had *two sons or two nephews;* that *she was very much exercised;* and *had not been able to sleep nights* and Mrs. Manley was also interested. This was all *said to Mr. O'Connell.* I took them to Mr. O'Connell's office *after a preliminary talk with them.* Mrs. Krause said, "Well, what can be done?" Then Mr. O'Connell spoke about the necessity of funds TO TAKE THE CASE TO THE UNITED STATES SUPREME COURT as the constitutionality of the act would probably be sustained by the lower court. He quoted one of the Judges in the lower court, stating that he did not want to take the responsibility of declaring a law of Congress unconstitutional just at this time. Mr. O'Connell said it would mean possibly $1500 or more to print the record; also mean going to Washington and possibly having Eastern counsel associated, *and that he had in mind the organization of a corporation TO TEST THE VALIDITY OF THE ACT. AS A RESULT OF THAT CONVERSATION* they came in the next day or so and *Mr. O'Connell went ahead with the incorporation. Mr. O'Connell and myself discussed the constitutionality of the Draft Act on many occasions.* I had a conversation with him upon the best method of testing the Draft Act, (Tr. p. 125), and the opinion Mr. O'Co nnell gave was that men who were drafted *would be arrested and that then the method would be to sue out a writ of habeas corpus.* It was a *lawyers' talk, furnishing authorities, etc. I know that Mr. O'Connell had a collection of authorities on his desk that he was studying and had been studying ON THE CONSTITUTIONALITY OF THIS DRAFT LAW. NIGHT AND DAY HE WAS EXAMINING INTO IT AND MAKING IT A SPECIAL STUDY,* so much so that the few cases we had together, not being partners, that all the work devolved upon me. (Tr. p. 126, fol. 201.)

I attended the preliminary meetings of the American Patriots in the Assembly hall of the Pacific Building. Mrs. Manley, Mrs. Krauss, Herman B. Smith, Mr. O'Connell and from thirty to forty other people, I should say not more than forty, were there. There were old and young men and women. Mr. O'Connell said something on the subject of ORGANIZATION FOR THE PURPOSE OF TESTING THIS DRAFT ACT AS THE PURPOSE OF THE MEETING. (Tr. p. 126, fol. 201.)

Mr. O'Connell was in the chair and spoke about the legislation which had been enacted by Congress and *the study he had given to this legislation; quoted from Daniel Webster on the draft law, also Attorney General Wickersham, and Hannis Taylor's message to Congress which was laid on the desks of all the Congressmen on the subject of the Constitutionality of the Draft Act, and had an array of legal documents and opinions* he read from the Constitution and stated that *ACCORDING TO THE CONSTITUTIONAL LAWYERS OF THE PAST AND PRESENT THAT THE MILITIA COULD NOT BE SENT OUT OF THE COUNTRY.* (Tr. p. 126, fol. 202.)

He said that anyone had a right to test the law in the absence of an opportunity to repeal the law. He also went into the cost and said it might be from $2500 to $5000, and that he could not pay it and no one man should be called upon to pay the expense. It was agreed to form a corporation for the purposes mentioned and there was a committee appointed to prepare articles of incorporation for the next day. *Mrs Manley, Mrs. Krauss and the rest of them were to report at my office the next morning.* I did not prepare the articles of incorporation. (Tr. p. 126, fol. 202.) I attended one meeting of the American Patriots after the incorporation, but none after that. Most of those present came forward and signed the roll and paid their fees that night. (Tr. p. 127, fol. 203.) Many

times Mr. O'Connell and myself were in accord on one feature of the unconstitutionality of this act, *BUT THERE WAS ONE OTHER THAT I WAS IN DOUBT ABOUT, and I am in doubt about now,* and we would talk these things over. I would chide him about giving so much of his time *to matters of a public nature, but he has been doing that all his life. I was not in sympathy with Mr. O'Connell wasting his time on these matters.* (Tr. p. 127, fol. 203.)

About August 4, I ceased to use Mr. O'Connell's reception room. There was a disagreement between us as to the time he was giving to the matter of the American Patriots, so I hired another reception room. Daniel O'Connell I think showed me a pamphlet which Hannis Taylor left on the desk of the Congressmen, and the Taylor document also included the Wickersham opinion. (Tr. p. 127.) We went back to the power of Congress to declare war, general war, or limited war. We went into the question very thoroughly. This law has not been adjudicated. I have an opinion that this law is unconstitutional and I have the United States Supreme Court as my authority. (Tr. p. 128, fol. 205.) Mr. O'Connell advanced the proposition to sue out a writ of habeas corpus and until that one case was determined the remainder would be entitled to bail. Mr. O'Connell in these meetings said, "We have no objections to any one enlisting, if you want to go and fight, go. I have no objection to any one enlisting." (Tr. p. 128, fol. 205.) He told them that they would probably be arrested, at which time they could sue out writs of *habeas corpus.* When they refused to take the oath then they would be arrested and they would be *entitled to their civil rights,* whereas he said, if you went into the army *you lose your civil right. Our talk about the act was before the formation of the organization.* I was not interested in the American Patriots. He said *When I am right and I KNOW I am right, nobody can*

advise me! He said, *"I AM ABSOLUTELY RIGHT IN THIS MATTER."* (Tr. p. 128, fol. 205.)

Mr. O'Connell told them to refuse to take the oath *and then they would not lose their civil rights.* Mr. O'Connell said, "If anybody wants to enlist voluntarily, go ahead." He told them to refuse to sign any papers *the effect of which would be to put them in military service and to THEN SUE OUT A WRIT.* Mr. O'Connell and myself read the Espionage Act together. *I did not advise Mr. O'Connell that his conduct would constitute a violation of the Espionage Act.* (Tr. p. 129, fol. 207.)

They were to have an office over in another building and I was afraid something might be done there that Mr. O'Connell would not approve of. I could not pursue the matter any further. I KNEW THAT MR. O'CONNELL WAS ANXIOUS TO HAVE EVERYTHING DONE LEGALLY. (Tr. p. 130, fol. 209.)

The proposition was that each man that was arrested should sue out a writ of *habeas corpus* and then that one man should test the law and the others remain out on bail until it was tested. THE PURPOSE OF THE CORPORATION WAS ON BEHALF OF THE MEMBERS TO TEST THE VALIDITY OF THE DRAFT ACT. I recognized the purposes of the corporation held out to these young men that they were inviting to enlist in its ranks was to protect them from going if they didn't want to go. *It did not occur to me that getting a large number of young men into the corporation upon the representation that they could be kept out of service AND THEN UNDERTAKE TO MAKE A TEST CASE OF ONE WOULD RESULT IN OBSTRUCTION.* It MIGHT prevent a number of young men from serving while waiting *until* the matter was *determined, BUT IT ALL DEPENDS UPON ITS CONSTITUTIONALITY.* That is the way we discussed it. IT IS FOR THE LAW TO SAY WHETHER THEY WILL WAIT OR NOT. THE

SOLE PURPOSE OF THE ORGANIZATION WAS TO TEST THE VALIDITY OF THE DRAFT ACT IN THE WAY I HAVE STATED. (Tr. p. 131, fol. 209.)

THERE WAS NO IDEA OF OBSTRUCTING THE LAW. IT WAS SIMPLY TO TEST ITS VALIDITY AND CONSTITUTIONALITY as Mr. O'Connell said to them, *"If you —— to enlist, enlist. We don't wish to prevent anybody."* (Tr. p. 131.)

It was not that the methods they were pursuing were not in accordance with the law that caused me to drop it. *There were other matters that CAME UP and I did think that somebody would do something THAT MR. O'CONNELL WOULD NOT APPROVE OF.* I saw nothing unusual in the methods pursued by Mr. O'Connell in this matter. There was nobody called to the service up to the time I left. *There were others who came in to test the constitutionality of the law outside the American Patriots* and all those that came in and consulted about it *DECLARED THEY WERE DETERMINED TO TEST THE LAW BEFORE THEY EVER SAW MR. O'CONNELL OR MYSELF and that they were not going to war, THAT IT WAS UNCONSTITUTIONAL. WOMEN CAME IN CRYING AND SAID THEY DID NOT WANT THEIR SONS TO FIGHT FOR ENGLAND,* and such things as that. I remember the CORPORATION THAT WAS ORGANIZED HERE IN SAN FRANCISCO TO TEST THE LEGALITY OF THE SPRING VALLEY RATES AND ALSO FOR SEWER ASSESSMENTS. (Tr. p. 131.)

David Jay Smith, defendant, testified: The first time I ever saw or communicated with Dr. E. R. Hoffman in any way, shape or manner, was after his indictment and arrest. The same as to the defendant Thomas Carey. The first time I saw the defendant Wacker was at the Humboldt Evening High School four or five years ago. We went to that school at that

time. I left there two and a half years ago and never saw or had any communication with him in any way, shape or manner until I say him at the meeting at Dreamland Rink, July 3, 1917, when I said "hello" to him. I did not speak to him until after the arrests in this case. I had no communication directly or indirectly with the defendant Daniel O'Connell until early in July 1917, when I went to his office with Louis Serbin's brother to secure him as attorney to defend Louis Serbin then in jail, and I was recommended to Mr. O'Connell. At that time I had no talk with him on the constitutionality or unconstitutionality of the draft act, or anything on that subject. The next time I saw Mr. O'Connell was July 13, 1917. I went down with my brother to his office to sign the articles of incorporation *the day following the preliminary meeting. I had not been at the preliminary meeting and knew nothing about it* until my brother came home and told me there had been such a meeting and he had agreed to be one of the incorporators for *the American Patriots which WOULD HAVE FOR ITS OBJECT THE TESTING OF THE CONSTITUTIONALITY OF THE DRAFT LAW.* (Tr. p. 142.)

I went down that day and a few people who were to sign didn't appear and I volunteered to sign *because I believed* the draft law unconstitutional and wanted to see the law tested, and also because I agreed with the other objects of the articles of incorporation, such as having a two-thirds vote of the people on a declaration of war, and instituting the initiative and referendum and recall in the Federal Constitution; *I believed they were more important and told Mr. O'Connell so, than even the testing of the constitutionality of the draft law.* Myself and brother signed the articles of incorporation. Mrs. Krause's name was on the paper when I signed, as also was the name of Mrs. Manley. *Mr. O'Connell had not signed. He was not there when my brother and myself arrived and signed.* I believe

we waited until he returned. The next time I saw Mr. O'Connell was at the first meeting of the American Patriots after the charter for the corporation was issued by the State. It was in the assembly hall of the Pacific Building. Myself, my brother, Mrs. Krause and Mr. O'Connell were there and about 30 or 40 other people. Those were the only defendants who were there that night. The objects and purposes of the corporation stated that night, were mainly to test the constitutionality of the draft law; to amend the Federal Constitution so as to include the initiative, referendum and recall, and also to make it impossible for Congress to declare war unless there was a two-thirds vote of the people ordering it. There was a great deal said that evening. I spoke on dues. The consensus of opinion that night was that they should be made as low as possible. I remarked to my brother that most of the people were not of draft age. There were women and men there. After that meeting that night neither my brother nor myself had anything whatever to do with the American Patriots. We never attended another meeting. We never went to headquarters. I didn't know where the headquarters of the American Patriots were until I learned it in court at this trial. After that night I didn't have any communication directly or indirectly with Mr. O'Connell about the American Patriots or the subject matter of the American Patriots. I never sent out any of the literature and did not have anything to do in any way, shape or manner with the American Patriots. *My brother resigned as a member of the American Patriots at the first meeting after the incorporation. We both resigned at that meeting. We tendered* our resignations that night. Mrs. Krause was elected secretary in place of my brother on that same evening. (Tr. p. 143.)

I resigned from the American Patriots by stating in the meeting that I wished to resign. That evening there was a temporary board of directors elected in the place

of those who had resigned, for my brother and myself. The minutes of the meeting are very imperfect. I merely got up and tendered my resignation. I didn't have to present a written resignation. I was a director as well as a member. I tendered no written resignation. The resignations were accepted without vote. Mr. O'Connell did put the question in this way, that of there is no objection to the resignations to the Smith boys, they will be accepted. I resigned because I was working at that time and going to law school in the evening; I was secretary of the Jack London School; I belonged to four or five other organizations and all of them took up every bit of spare time I had and I could not give it any time. I joined for the purpose of forming the organization (Tr. p. 144) *for the purpose of testing the constitutionality of the draft law*, because I believed the law to be unconstitutional; I voluntarily committed myself to the purposes of the organization. I resigned because I don't believe in belonging to any organization that I cannot give my active time to. I have made that a policy and have kept it. I didn't resign because I didn't like the way things were going. A discussion came up about dues. I did state at that time that I did not see how it was possible to get sufficient funds to bring a test of the draft law before the Supreme Court on 25 cents a month dues. I did have it in mind when I was making the speech on dues to resign. I didn't intend the amendment of the constitution to be made while the present war was on. I didn't believe and don't believe now that the purposes of the organization would of themselves necessarily cripple the efforts of the United States in the present war and such a question never entered my mind until I heard it discussed here in the court room. Any time is an opportune time to urge important reforms. I have been in favor of the very same things in the Socialist party for the past seven years. I didn't think the entering

the war was a good time to start it. My brother and myself were going down town for the purpose of signing the articles of incorporation as he agreed to do the night before. We went down and waited for Mr. O'Connell. There were two names signed to the articles of incorporation. Another person was supposed to come and sign, but did not come. I didn't know who it was and was asked to sign the articles of incorporation and believing in these principles I signed them. I have made no public speeches on the draft law or on declaration of war. I have discussed it among friends and no more. I am opposed to war in general; I was opposed to the U. S. entering the war. Since the United States entered the war my policy has been mainly watchful waiting. (Tr. p. 145.) I cannot see how one individual can contribute much to the success of such a gigantic proposition as the success of this war. I don't think I have done any harm. I believe that the people's council were right when they endorsed President Wilson's policy of stating that the best way of settling this war was to settle it without victory for either side. I believe in that policy. I also favor the repeal of the draft law. I have not stated definitely that this war is a nonsensical, in the interests of the rich against the poor, and the time to settle it is right now, and the way to get out of it is to back up. I am noticing day by day revelations of matters here that vitally affect the safety of our country, but I am opposed to all wars on the ground that it is murder to kill people, in war, or to kill them individually. I have taken the position as a Socialist that all wars are necessarily capitalistic wars. That they are necessarily so. You see, we take this position as Socialists, that we believe that. I do contend that it has been admitted during the war that this war is a war of trade; it has been admitted on the part of the Allies that Germany entered this war for trade purposes and I never have examined very carefully the leaflet No. 5 of the Social-

ist party put in evidence here. While I am a member of the Socialist party or organization, I don't read all the literature. We moved the literature down to Moose Auditorium so it could be distributed, *not to keep the U. S. government from seizing it.* When I went down to the Hotel Fresno and rented a room *I was obeying instructions from the secretary of the party. I was not secreted in that hotel for the purpose of preventing the government from seizing it nor was I told so at the time.* The first time I heard of it was when Mr. Rathbun said so on the witness stand in this case. Registration day was June 5th and we intended to circulate the literature *at the meeting of June 3rd.* I was at the hall as an usher. I didn't see the part of the circular which says they were to resist all industrial and other kinds of conscription. I didn't read that part of it which says: "We brand the declaration of war by our government as a crime against the people of the United States and against the nations of the world." (Tr. p. 146.)

I stated point blank that I had not read that literature. I have not read that leaflet No. 5 or No. 6. I know there is a law against seditious literature and utterances. I have absolute faith in the Socialist party and don't believe they would distribute any literature that was seditious and that is why I aided them in distributing their literature. I didn't hear my brother deliver his speech at the meeting of July 3rd. I was in the hallway. I heard them read here. I don't endorse my brother's statements entirely. The main purpose of the meeting was not to collect money for the support of conscientious objectors. I did not know at that time what my brother had stated. I did not hear him make the statements the United States Attorney read in evidence. I never heard those statements now read. (Tr. p. 147.)

I knew the brother of Louis Serbin as a member of the Workmen's Circle, a Jewish Fraternal Order.

When I went with him to Mr. O'Connell's office I did not know what his brother was arrested for. I learned it after Mr. O'Connell had appeared in his behalf. His brother did not know either. No one knew why. Mr. O'Connell went out and found out about the matter. Somebody recommended Mr. O'Connell, I think it was Mr. Serbin's own brother. *I am absolutely sure I didn't recommend Mr. O'Connell. I do not know who recommended him.* I think Serbin's brother told me he wanted to go down to Mr. O'Connell. I have not talked with Serbin about it. I went to Mr. O'Connell's office with Serbin as a friend of Serbin's. I had no personal business with Mr. O'Connell when I went down to his office at any time except in seeing that Mr. Serbin secured counsel, because I believe every man deserves counsel and a right to trial and a proper defense as an American right. It was the business of the counsel to find out what he was charged with. I did not know. I would do the same thing for any man I would know. I think I have sent four of my friends down to Mr. Yost on civil cases. I heard him speak at Dreamland Rink and met him at Mr. O'Connell's office. (Tr. p. 147.)

I did not see any of these wagons going up and down the street, nor any of these slides at the moving picture shows. *I hired the room at the Hotel Fresno for the Socialist Party and they paid for it. The secretary of that party paid the bill personally.* (Tr. p. 148.)

I am not an anarchist and never studied the subject or gave it any consideration. I am not an I. W. W. I know its principles. I endorse the principles of industrial unionism which means that the workers should be organized according to their industry instead of according to their particular craft. Mr. O'Connell did not ask me my age. (Tr. p. 148.)

Herman B. Smith testified as follows: I was 21 years of age July 11, 1917. *I first saw Mr. O'Connell at the time I was arranging the meeting of July 3rd.*

I went to his office to ask him to speak on the constitutionality of the legislation before Congress. At that time Mr. O'Connell told me he was going out of town. I got Mr. Yost instead of Mr. O'Connell. (Tr. p. 150.)

It must have been the latter part of July when I first saw Mr. O'Connell. *The first time I saw Dr. Hoffman was after we were arrested. I did not know him before that time and don't recall seeing him. The time I saw the defendant Carey was after we were arrested in this case. The first time I saw the defendant Wacker was at the Humboldt Evening High School. We always disagreed and after we left school the first time I saw him was in the hallway at the meeting of July 3rd and I just said "Hello" to him and left him, and the next time I saw him was when we were arrested in this case. It was two years prior to the evening of July 3rd that I last saw Wacker. I never had any communication with him directly or indirectly between those dates. After July 3rd the next time I saw him was after our arrest. Between July 3rd and the time of our arrest I had no communication directly or indirectly with Mr. Wacker and did not even know he was a member of the American Patriots. I never had any communication directly or indirectly with the defendant Carey. I had no communication directly or indirectly with Dr. Hoffman until after we were arrested.* (Tr. p. 150, fol. 238.)

When I went to get Mr. O'Connell or Mr. Yost to speak I did not know either of the gentlemen. Somebody told me they were good speakers and lawyers and I went up to ask them to speak. Mr. Yost agreed to speak, but Mr. O'Connell said he could not as he was going out of town. *That is all the conversation I had at that time.* (Tr. p. 150, fol. 238.)

On the afternoon of the same day or the next day I had another conversation with Mr. O'Connell regarding the threats that were made in the newspapers against the meeting that was held on July 3rd, the

re-declaration of independence mass meeting. The papers were set against anybody who took part in it. I went to see Mr. O'Connell about it and we talked the matter over. I understood from my studies that we had a right to hold a public meeting and did not see how we could be interfered with. Mr. O'Connell reaffirmed me in my belief so I went ahead with the meeting. I issued a statement in the "Daily News" saying that the meeting did not contemplate anything illegal, or resist any laws, but was merely for a petition of grievances to Congress, the "Daily News" and "Chronicle" I think carried that report. At that meeting of July 3rd we presented a petition such as was read in evidence by Miss Kearns. I sent a copy of the petition to Congress and to the President and to some of the Senators and some of the members of the House. I think there were about 6000 up at the meeting and they all voted in favor of the petition. It was read at the beginning, and I asked everybody that spoke to address themselves to the petition. At the end of the meeting we took a vote on the petition and I sent it the next morning. The vote was a rising vote and everybody I presume stood up. I guess even the government agents stood up, because they did not want to be conspicuous. (Tr. p. 150.) I was informed that there were reporters there to report the meeting. I invited them to the platform. I noticed in the audience a young lady sitting next to Rathbun, the special agent of the Department of Justice. I invited her to sit up in front. She is the lady who has already testified here, Miss Kearns. She was too modest to accept my invitation. I sent away the petitions. I don't know the exact time that I saw Mr. O'Connell. I attended the preliminary meeting of the American Patriots. Somebody told me that there was to be a meeting that was how I came to the meeting. *On the night of July 12th somebody told me* there was to be formulated plans for some kind of an organization. I

did not pay particular attention to what it was; I went along and I came to the Assembly Hall of the Pacific Building and there I met Mr. O'Connell and Mrs. Manley and Mrs. Krause and a number of other people, Mr. Yost and quite a number. There was a number of old men and young men and women there and when the meeting was called to order *Mr. O'Connell stated the purpose of the meeting, it was to form an organization to test the constitutionality of recent legislation that was enacted by Congress.* Mr. O'Connell made a number of statements there and a number of other people made statements. I think it was Mrs. Manley who got up and stated we should have a plank for suffrage in the purposes of the organization because she believed that the women should have a right to express their opinion because the motherhood of the land was the one that was going to suffer from the war and that they should have a right to have something to say about the declaration of war. Somebody else stated that they believed that the war should not be declared, except by a vote of the people; somebody else said they should test every other piece of legislation passed, that the initiative, referendum and recall should be embodied in the United States Constitution, that we should work such an amendment to the Constitution; there were a number of statements made at that time. I just cannot recall every one of them. *All of the items that are to be found in the articles of incorporation were suggested by somebody in that meeting and there were many others that were thrown out as being unwieldy.* Nothing could be done with them *Somebody made a motion that we incorporate an organization to be known as the American Patriots, which was to be organized the next day and everybody interested was invited to come up and sign the incorporation papers. A number of people volunteered, among them was Mrs. Manley, Mrs. Krause who was known to me as Mrs. Malloy. I volunteered* and a number of

others; I don't recall all the names at the present time because they have not been recalled to me and I have had no occasion to recall them. (Tr. p. 151, fol. 241.)

One of the ladies stated she had a couple of her sons or nephews or somebody subject to the draft, and she wanted to do something to help them out. I don't know whether she said to keep them from going. She stated that the law was unconstitutional and that the war was wrong. I think it was Mrs. Krause that said the war was wrong. She was a pacifist. She didn't want her boys to go to war; she was praying to have *something done to help them out. Everybody there that came together had the idea of doing something, not the idea of obstructing any laws but* (Tr. p. 151, fol. 241) *simply the idea of testing the constitutionality of the law. I never heard anything else about any idea except to test the constitutionality of the legislation. It was not only Mr. O'Connell, but everybody in the house who desired to talk, and there were quite a number of them, that endorsed the remarks, and by the applause of the rest, that evidently was their opinion, too.* The enlistment proposition did not amount to anything at that time; it was the draft proposition that amounted to something. *It was stated that all those that wanted to go to war and believed in it should certainly go ahead;* nobody objected to them, it was only those people who were looking forward to testing the constitutionality of the law and could not do it by themselves would ask what they could do. (Tr. p. 152, fol. 241.) So far as anybody coming in there and saying they wanted to get out of the draft themselves, and wanted to evade it, I don't recall anybody making any such statement or anybody going up there with such motives. *It was frequently stated that all those that desired to go should go.* (Tr. p. 152, fol. 241.)

"I don't recall anything said about universal training or service. The next time I saw Mr. O'Connell was

the next day at his office. My brother was not at the meeting, at the preliminary meeting of July 12th." (Tr. p. 152, fol. 241.)

ADMISSION BY U. S. ATTORNEY.

AT THIS POINT THE UNITED STATES ATTORNEY SAID THAT HE DID NOT CLAIM THAT THE BROTHER WAS THERE, AND MADE NO DISPUTE ABOUT WHAT TOOK PLACE AT THE MEETING. (Tr. p. 152, fol. 241.)

The witness resumed his testimony as follows: We were supposed to be at Mr. O'Connell's office at 11 o'clock or noon. My brother came along with me, Mr. O'Connell was not there and I waited for him to return. The Articles of Incorporation were already signed by Mrs. Malloy or Mrs. Manley or bore their signatures. My brother had volunteered to sign because somebody had failed to appear who was supposed to sign. At the time I was asked to act as temporary secretary and I did. I don't think I ever took any minutes down. At the next meeting I resigned with my brother, we both resigned at the time verbally. I declined to act further as secretary and withdrew from the organization, and never attended the meetings since. It was accepted and Mrs. Malloy was elected as secretary in my place. That was the meeting after the charter was granted. All the signers of the incorporation papers except Mrs. Manley were present at that meeting. (Tr. p. 152, fol. 242.) After that meeting I had nothing whatever to do with the American Patriots and I did not go near their headquarters. I had no connection with any of the officers and knew nothing as to what was done after that. There was nothing done at the time I was in the organization. I left the American Patriots absolutely that night and it was my intention to leave them and I did. My brother did the same thing. (Tr. p. 153, fol. 242.)

I know that this literature of the Socialist party

came to the Socialist party and my brother was asked to bring it down for the secretary and he did it as a favor to her. I know he took it down there. (Tr. p. 153, fol. 243.)

I have no brother other than Dave and he is only 19. I have no relatives in the service or subject to the draft act. My mother is a Russian Jew and my father was a Russian Jew but he is dead so long I don't know. I am a Socialist and have been for seven or eight years. Before the war I was as much against German Democracy as I was against English Plutocracy. I took no sides. I was always in favor of peace. I did not see where anybody had anything to gain out of the war. (Tr. p. 153, fol. 243.)

One of the objects stated in the Articles of Incorporation of the American Patriots was to test the constitutionality of all laws that interfere with the Constitution. The people are the judges of all laws that are going to be tested. I never gave any consideration as to who was going to direct the American Patriots or what they should do to test the laws of Congress and orders of the executive. I was not there at any meeting after the organization or when they discussed that point. I suppose all who are learned in the legal provisions would be able to judge what was to be done. It was not too big an undertaking for real, true American Patriots to challenge and test in the courts each and every act of the State department that violates the constitution. There were very good articles in those Articles of Incorporation. I did not give any thought on the point of whether any of these things would be carried out during the present war. (Tr. p. 158, fol. 251.)

I recognized that the powers that were in and that the only way you could do anything was to go to the people and tell the people your sentiments and see that all that agreed with your sentiments *got together and petitioned Congress for a redress of the griev-*

ances. I was not concerned with whether they would stop them immediately or later, but I believed that the people should have a right to vote whether they wanted to go to war or not. I believe that every official that disobeys the trust of the people should be subject to recall. I believe the people should have the right of referendum and the right of initiative. I believe that any law that is regarded as inimical to the best interests of the people, or any part of the people, *that that part of the people have the right to test that law.* I believe that those Congressmen who disobey the will of the people should be recalled. I think the people are expressing themselves very well, now, because every Congressman that is going back home is being defeated by the people opposed to him. *I was willing to join this corporation for the purpose of testing the law. I was not concerned about the number of test cases. The first time I ever thought about it was when the United States Attorney brought it up in this case in this court.* We wanted everybody as members who wanted *to test the law.* There was no method designed as to how or with whom we would test it. I thought that would be taken care of later. I heard no discussion while I was a member, of a resolution to secure a bonding company to make bail for those arrested. (Tr. p. 158, fol. 251.)

I never heard anybody say anything about the American Patriots at the meeting of July 3rd. I never thought of the organization until the night of July 12th. There was nothing said about any project to organize the American Patriots at the meeting of July 3rd. (Tr. p. 160, fol. 254.)

I based my judgment that the draft act was unconstitutional ON A NUMBER OF THINGS; the main thing was the Constitution itself. There was one Amendment to the Constitution known as the 13th Amendment, that was passed after the Civil War. *I had authority on which I based it. I READ DANIEL*

WEBSTER'S SPEECH. I read President Wilson's message in 1916, when he was on a speaking campaign. I READ ATTORNEY GENERAL WICKERSHAM'S OPINION; I READ HANNIS TAYLOR'S ADDRESS TO CONGRESS; I READ A NUMBER OF THE SENATOR'S AND CONGRESSMEN'S—THEIR OPINION ON THE CONSTITUTIONALITY OF THE DRAFT LAW AT THE TIME IT WAS PROPOSED IN CONGRESS. I read a number of current articles in periodicals. (Tr. pp. 160, 161, fols. 254, 255.)

Thomas Carey, one of the defendants, testified as follows: *I first saw Daniel O'Connell July 25, 1917,* in his office. I told him my name was Thomas Carey and he asked me what I was going to do. I said to to him, *"I am going to test the constitutionality of the draft law."* Prior to that time I had joined the American Patriots *on that day at its headquarters in the Mechanics Building.* I went over there and joined them of my own volition and no person solicited me. *After I joined them I went over to see Mr. O'Connell. Before I joined them I had determined to test the constitutionality of the draft law.* When I went over to Mr. O'Connell's office I told him I had joined the American Patriots, and he said all right. I intended to test the constitutionality of the draft before I ever knew of the American Patriots, and Mr. O'Connell said that is all right. Mr. O'Connell then asked me if I had registered and I said yes. *He then told me to go and take the physica lexamination and obey the law in every legal way and then we will test the constitutionality. That is the substance of our conversation.* (Tr p. 162, fol. 257.)

The first time I ever saw the defendant Herman B. Smith, David J. Smith and Carl Wacker, was after the indictment and after we were arrested in this case at the time we had given bail before the Commissioner. *The first time I saw* Dr. Hoffman was August

3rd, the day I went to the headquarters with Mr. Murphy. *I never had any communication directly or indirectly* with either of the three defendants, Dr. Hoffman, and the two Smith boys, prior to the time we came up to the Commissioner's to give bail and were technically arrested. I never had any conversation with any of them at any time on the subject of obstructing the draft or obstructing the enlistment or evading the draft. (Tr. p. 163, fol. 259.)

Dr. E. R. Hoffman, one of the defendants, testified as follows: I am a regular physician and surgeon, duly licensed to practice in the State of California. I was born in California and have resided in San Francisco most of my life. *The first time I saw any of the defendants was on July 21, 1917*, when I saw Mr. O'Connell at a meeting of the American Patriots in the Assembly Hall of the story of the Pacific Building. *I never had any communication with him prior to that* except that during the day of July 21, 1917, I called him on the telephone and asked him when there would be a meeting of the American Patriots and he told me that night at 8 o'clock, and I went down to the meeting. I saw none of the other defendants that night. I never saw Herman B. Smith until sometime after I had become a member of the American Patriots. I think it was just before Mr. O'Connell was arrested. It was after we opened headquarters in the Mechanics Building. I saw David J. Smith a few days before I saw Herman. I saw the defendant Carey early in August. I cannot remember the date. My first recollection of seeing Wacker is after he had been arrested. (Tr. pp. 131, 132, fols. 210, 211.)

Carl J. F. Wacker, one of the defendants, testified as follows: *I first saw the defendant Daniel O'Connell August 6, 1917, in his office in the Pacific Building.* I have known the defendants Herman B. Smith and David J. Smith for the past four years. I went to night school wit hthem. *The first* time I saw the de-

fendant Carey was at the preliminary hearing of this case before Commissioner Krull in this building, August 6, 1917, and after we were all arrested. The first time I saw Dr. Hoffman was on August 6, 1917, prior to the time we were arrested. I saw Herman B. Smith and David J. Smith at a mass meeting in Dreamland Rink, *but I had not seen them for two years prior to that mass meeting and after they left night school. I left night school in the early part of 1916. After that I did not see them until the mass meeting at the Dreamland Rink.* That mass meeting was on July 3rd, when I saw both of the Smiths. On August 6, Mr. O'Connell sent me over to the headquarters of the American Patriots where *I saw Dr. Hoffman for the first time.* The first meeting of the American Patriots I attended was on August 13th. *I never had anything to do with any of the defendants except as a member of the American Patriots.* (Tr. p. 114, fol. 184.) I never talked with any of them about the enlistment law or enlistment in the U. S. Army at any time. The draft act I discussed with members of the American Patriots only in a general way. I never knew that Herman B. Smith or David J. Smith were at any time members of the American Patriots. I was secretary of the American Patriots and they were not members. (Tr. p. 115, fol. 184.)

Louis Serbin testified: I was 17 years of age on August 20th. I worked at one time in the office of the American Patriots. *I was not even acquainted with Mr. O'Connell before July 3rd. That was the first time I saw him.* (Tr. p. 108, fol. 174.) Mr. O'Connell first saw me when I was in jail July 3rd. He came up there with my brother that day, before the American Patriots was organized. (Tr. p. 110, fol. 177.)

I was at the preliminary meeting of the organization of the American Patriots and saw there Mrs Manley, Mrs. Krause and about 25 other people, half old and half youg people. There were speeches made

as to the purposes of the proposed organization. *Herman B. Smith was there* but David J. was not. *None of the other defendants were there. Mr. O'Connell said the real purpose of the organization was to test the constitutionality of the draft act. That in his opinion it was unconstitutional. That all those who wanted to go to war should be made to go to war. That preachers who prayed for war should be made to go to war, and editors who wrote about war should be made to go to war.* He also invited reporters to come to the meeting and the doors were wide open and everybody was welcome. (Tr. p. 108, fol. 175.)

ADMISSION BY U. S. ATTORNEY.

I was never a member but simply worked at the office for a while and newspaper reporters were invited to every meeting.

AT THIS POINT THE UNITED STATES ATTORNEY SAID THAT HE DID NOT CONTEND THAT THERE WAS ANY SECRECY ABOUT ANY OF THE MEETINGS. (Tr. p. 109, fol. 175.)

Mr. O'Connell said that a few men had come to his office previous to that evening and told him they were opposed to the draft act and wanted to test it, and he told them they could not finance the contest because the expense would be too great for the individuals That if they wanted to test it the best way was to organize a corporation and do it collectively so that all members could contribute to the general expense and that was what originated the idea of organizing the American Patriots. Something was said on the point of Mr. O'Connell being interested in having the law tested. Something was said about the discussions in Congress on the constitutionality of the law when it was passed, and the opinions of Senators LaFollette and Works, who were opposed to the draft. Mr. O'Connell read extracts from their speeches and at later meetings spoke about the speech of Daniel Web-

ster on the subject. Mr. O'Connell said that all those that wanted to enlist should be the first ones to enlist, and those who weren't afraid to say their souls were their own and who were opposed to war were welcome in the organization and could aid *the general purpose of the organization to test the law,* but Mr. O'Connell never advised any one to obstruct the law. (Tr. p. 109, fol. 175.) The second meeting was at the same place for the purpose of organizing the corporation. The papers were there to be signed by those who wished to do so. Those who wished to become members could sign. The charter had already been received from Sacramento. At this second meeting Herman and David Smith were there and the only other defendant was Mr. O'Connell. Mrs. Krause was there and about 30 others. That was the first meeting after the receipt of the charter. Mr. O'Connell outlined the purposes of the corporation the same as at the first meeting. At the third meeting neither Herman nor David Smith were present. The only defendant present was Mr. O'Connell. Temporary officers were elected at the second meeting, being the meeting that the charter was received. Mr. O'Connell was elected President and Herman B. Smith was elected secretary pro tem. At the next meeting, which was the third meeting, Mr. Smith resigned. Mrs. Krause or Mrs. Malloy was present at almost every meeting after the third. The headquarters were opened the latter part of July and I immediately went to work there. After a week or so members came up and assisted me. Mrs. Malloy was there at least three times a week. She directed me what was to be done and I obeyed her orders. The day Mr. O'Connell was arrested at the Peoples' Conference meeting Mrs. Malloy was at the headquarters. She usually stayed a few hours and sometimes half a day or longer at headquarters. Mr. O'Connell never sent out any circulars. They were all sent out at head-

quarters. Government Exhibit 11, is the kind of circular that was sent out. (Tr. p. 109, fol. 176.)

At the first meeting Mrs. Manley made a very enthusiastic speech about the meeting. She appeared very enthusiastic. (Tr. p. 110, fol. 177.) When Mr. O'Connell said that editors and Wall Street fellows and others who were talking about war should go first, he said that those who didn't want to go should not be made to go. It was not the object of the organization to gather together those who did not want to go, only those who had back bone to say they did not want to go were welcome in the organization to test the law. *Not to resist going to war but to test the law.* We did the best we could to get funds to proceed with our work *but there was not any occasion to test the law at that time.* (Tr. p. 111, fol. 179.)

RESULTS OF THE FOREGOING EVIDENCE.

The foregoing is *all the evidence relating to the formation of the corporation, and its purposes, and of the first communications between any of the defendants, and of the first and all agreements, understandings, or conspiracies, between any, or all, of them.*

From all that *undisputed evidence plainly appear the following UNCONTRADICTED FACTS*:

1. *The first time any of the defendants*—except the Smith brothers, Herman B. Smith and David J. Smith —*ever saw,* or *ever communicated with, any of the other defendants, was July 3, 1917.*

2. This makes *vitally and decisively important the other four PRECEDING dates*—June 2, June 3, June 19, and June 27, 1917—on which dates *acts done by a person other than any of the defendants; and acts done by only one of the defendants and not connected with any of the other defendants were admitted in evidence;* and also admitted in evidence *against all of the defendants;* and afterwards *dilated upon, expanded and emphasized, against all the defendants.*

3. Also, on July 3, 1917, the only communication was when Louis Serbin's brother came with the defendant David J. Smith to the defendant Daniel O'Connell's law office to retain Mr. O'Connell to find out what Louis Serbin was arrested for, and to get him out of jail; and on the same day, but not connected, Herman B. Smith asked Daniel O'Connell to speak at a mass meeting in Dreamland Rink July 3rd 1917, and Mr. O'Connell declined, saying he was going out of town. *This was the entire communication on that July 3rd, 1917, between any of the defendants.*

4. This makes *vital and decisive* the admission in evidence of the seizure by Special Agents of the Department of Justice in Hotel Fresno *June 2, 1917,* of Document No. 5, being the anti-war leaflet of the Socialist Party, left at the hotel by the Socialist Party, for distribution at a mass meeting to be held in the Moose Auditorium, near by, on *June 3, 1917,* by the Socialist Party, of which party *only* the defendants David J. Smith and Herman B. Smith were members, with which literature, or Socialist Party, *none of the other defendants were in any way connected, and THIRTY-TWO DAYS before there ever was any communication whatever* between *any of the other defendants on any subject.*

5. For the same reasons, the admission of said *seized leaflets in evidence and reading them to the jury, and giving copies to the jury to read, is equally vital and decisive.*

6. For the same reasons, the admission in evidence of the *red cards advertising that meeting of June 3, 1917, is equally vital and decisive.*

7. For the same reasons, it also makes *vital and decisive* the admission in evidence and reading to the jury the demurrers setting up the unconstitutionality of the draft law in the cases of U. S. vs. Gambo and U. S. vs. Cohen, in the U. S. District Court *June 19, 1917,* and the failure to appeal from the order overrul-

ing those demurrers from the judgments and sentences entered in those cases *June 27, 1917, as showing bad faith and want of good faith in the defendant Daniel O'Connell, claiming that the draft act was unconstitutional.*

8. For the same reasons, it makes *also vitally and decisively important the admission in evidence against all of the defendants, of the literature advertising a mass meeting of July 3, 1917,* with which meeting only one of the defendants—Herman B. Smith—had any connection whatever.

9. For the same reasons, it also makes *vitally and decisively important the admission and reading in evidence* against all the defendants *of a stenographic re-report of what said Herman B. Smith said at that meeting.* The only other defendants present being his brother, David J. Smith, and Carl J. F. Wacker; *but they were present merely as spectators.* None of them had any communication with each other except to say "Hello."

10. The fact plainly appears undisputed that that meeting of July 3, 1917, was *an open public assembly, opened with the reading of a petition to Congress for the redress of certain grievances stated therein and praying for certain action by Congress and all the speakers were directed by the chairman that they must address their remarks directly to that petition, and the reporters of the Department of Justice and of the newspapers were requested to take the platform in order to report the speeches fully and correctly, and a lawyer read the Declaration of Independence,* and such a meeting was protected by the Constitution of California as well as the Constitution of the United States and comes within the definition of free speech at a public assembly, and what any speaker said could not be introduced in evidence *against anybody else, if it could be against himself.*

11. It makes *vital and decisively important* that

part of the judge's charge to the jury quoting a part of those remarks and *emphasizing them against all the defendants* as follows:

"This language is not distinctly seditious in character, *was at least outside and beyond any such purpose as claimed by the DEFENDANTS as the OBJECTS THEY had in view*, and its natural and only tendency would be to inflame the minds of the public and sway it against the act in question and induce them to oppose and obstruct its enforcement. *It was therefore wholly unjustified for any innocent purpose and was not protected by the right of free speech, or otherwise, and you have the right to so consider it, in determining the defendants' purpose.*"

12. *Plainly and undisputed, July 12, 1917, was the first date that any of the defendants could possibly be claimed to have come to any* understanding, or agreement, or "the *union* of two or more persons, the *conscious* participation of two or more *minds* which is indispensable to a conspiracy," or *any* conspiracy, and any and all acts claimed to have been done in pursuance of the conspiracy *must be on and after July 12, 1917, AND NOT BEFORE.*

13. *Plainly and undisputed the only thing THE DEFENDANTS* agreed upon was the organizing of a corporation *for the purpose of raising the funds to test the constitutionality of the draft act.* Other persons present forced *other purposes* on them as a part of the purposes of the corporation *as is often done in public meetings*, as was done in first fixing the dues at 25 cents a month. *But no more than the objects and purposes stated in the Articles of Incorporation can be said were the objects and purposes agreed upon*, or *understood*, or *on which there was the conscious participation of minds*, and *the corporation with its admission fees and dues was organized for the purpose of RAISING THE NECESSARY FUNDS to carry out those purposes specified in the articles of incorporation.*

14. There was *no evidence of* any *subsequent* agreement, or understanding, or "conscious participation of minds", of any of the defendants. The District Court in its ruling admitting in the records in the cases of U. S. vs. Gambo and U. S. vs. Cohen expressly states *its understanding that THE CORPORATION was the conspiracy relied upon and set forth in the indictment.* The same is the theory of the government throughout the case.

15. It is *uncontradicted* that only *three of the defendants* became members of the corporation when formed July 12, 13, 1917, and two of those three—the Smith brothers, David J. Smith and Herman B. Smith —*resigned and ceased to be members July 17, 1917,* (Tr. p. 84, fol. 136) *and never thereafter had anything to do with the American Patriots,* leaving Daniel O'Connell as the only defendant, a member from July 17 to July 21, 1917, when Dr. E. R. Hoffman became a member on that day the first time he ever saw, or communicated with any of the defendants and then only one defendant, and that defendant Daniel O'Connell, who were the only *defendants* members from July 21, to July 25, 1917; then the defendant Carey became a member, which was *the first time he ever saw or communicated with any of the defendants,* and then only the defendants Hoffman and O'Connell. These three defendants were the only defendants members of the corporation between July 25 and *August 6, 1917,* when the defendant Wacker became a member, which was the first time he ever saw or communicated with the defendants Hoffman and O'Connell and never saw or communicated with the defendant Carey until he saw him in court in the trial of this case. *ON AUGUST 6, 1917 COMPLAINT WAS FILED, WARRANTS ISSUED AND THE DEFENDANT O'CONNELL AND OTHERS ARRESTED.* August 6, 1917, was therefore *the termination of any alleged conspiracy.*

16. It also appears that Daniel O'Connell was a

lawyer duly admitted to practice in the State and Federal Courts, and actually practicing in those courts, having law offices in San Francisco. The Courts will take judicial notice of the fact that before such admission he must have taken the several oaths to "SUPPORT THE CONSTITUTION OF THE UNITED STATES." He had been studying day and night the constitutionality of the draft act, examined all the authorities on the subject, including the speech and arguments of Daniel Webster, Hannis Taylor, Senators and Representatives in Congress, and the opinion of former Attorney General Wickersham. An exhaustive examination would include other authorities not specified. This examination was also accompanied by an examination and discussion with another lawyer in the adjoining offices. They both came to the conclusion that the draft act was unconstitutional. Mr. O'Connell's opinion that it was unconstitutional, that he said to the other lawyer: "*I AM ABSOLUTELY RIGHT IN THIS MATTER.*" "*WHEN I AM RIGHT, AND I KNOW I AM RIGHT, NOBODY CAN ADVISE ME.*"

17. This Court will take judicial notice of the fact from the cases brought and argued before it and throughout the country, that *such an opinion of the draft act could be held IN ABSOLUTE GOOD FAITH.* It is *uncontradicted and admitted,* that Mr. O'Connell in all his speeches and declarations, said that *it was the duty of every person to enlist who believed the draft law constitutional or was not going to contest it, and that even those who were going to test it, must register, take the physical examination,* and *take every step in compliance with the law until the time arrived for testing it,* when they were asked to take the oath and sign the roll as a member of the military forces, after which they would be within the exclusive jurisdiction of the military law and military authorities. Mr.

President was the president and legal adviser of the corporation.

18. The *legal result* of the foregoing uncontradicted facts will be considered later in the argument in this brief.

EVIDENCE ON THE SECOND OVERT ACT.

We have hereinbefore set forth all the evidence offered by the government on this second overt act, and the copy of the so-called "O'Connell Claim of Exemption."

The first claims of exemption were prepared for Thomas Carey, John Murphy and Michael Donlon, *three Irishmen,* and the evidence is as follows:

Thomas Carey, one of the defendants, testified as follows: I am the same Thomas Carey who signed the O'Connell claim of exemption put in evidence in this case. I left it with the board. I got this claim of exemption in Daniel O'Connell's office. *I ASSISTED IN THE PREPARATION OF IT. I read it before it was finally finished, especially the last sentence of it, WHICH WAS PUT IN AT MY SUGGESTION. I WANTED IT PUT IN THE CLAIM OF EXEMPTION because I did not believe in going back and fighting for England. I WOULD ALWAYS FIGHT FOR AMERICA. I first* saw Daniel O'Connell July 25, 1917 *IN HIS OFFICE. PRIOR TO THAT TIME* I had joined the American Patriots, on that day, at its headquarters in the Mechanics Building. *I went over there and joined them of my own volition and no person solicited me.* (Tr. p. 162, fol. 257.)

After I joined them I went over to see Mr. O'Connell. *Before I joined them I had determined to test the constitutionality of the draft law.* When I went over to Mr. O'Connell's office *I told him I had joined the American Patriots* and he said all right. *I told him my name was Thomas Carey* and he asked me what I was going to do. I said to him, *I am going to test the con-*

stitutionality of the draft law. I INTENDED TO DO THAT BEFORE I EVER KNEW ABOUT THE AMERICAN PATRIOTS, and Mr. O'Connell said, that is all right. Mr. O'Connell then asked me if I had registered and I said yes. *He then told me to go and take the physical examination AND OBEY THE LAW IN EVERY LEGAL WAY AND THEN we will test the constitutionality.* That is the substance of our conversation. (Tr. p. 162, fol. 257.)

I thought the law was unconstitutional myself. I could read the constitution, but I did not read or see it. *I heard great speakers who put in my head to test the constitutionality of the law. I heard Senator Works. I intended to test it in court and that is what I am doing now. I intended* to refuse to answer the call when I could be notified to appear. *I did not want to obstruct the law. I thought it was unconstitutional and I was going to test it by getting arrested and be tried in court. I WOULD RATHER GO TO JAIL THAN GO OVER AND FIGHT FOR JOHN BULL. I think that it is John Bull that is ruli[illegible]g this country. I think that this country is absolutely under the thumb of John Bull.* I don't know anything about it being corrupt. *I think he is running it all right. He has run it all to smash.* I thought that this was a free country, and that is how I came to this country. *The English are running it. The English capitalist is responsible for most of it, I mean.* I have been a citizen three years. *When I was admitted to citizenship I took an oath to uphold the constitution of the United States and to fight for this country and swore to uphold the laws of this country. I think this law is unconstitutional and I am testing it. I want to know about it.* I know that this is what we call a representative form of government and have a Congress and a Senate that passes all the laws and that they are presumed to be vaild until they are declared otherwise, and that it is the duty of every naturalized citizen who has taken an oath to

uphold the law to uphold them. *The reason I put the last statement of the last paragraph* of the O'Connell claim of exemption *was I had no use for England. I think that all the troubles are England's troubles.* I don't want to see the United States in the war at all. She is already in by the legal method, but that is the trouble. Why did she go in? (Tr. p. 165, fol. 262.)

She recognized that the Germans had started a war against us and it was so declared by Congress. I want to see the United States get out of it by stopping the war. I want to stop the war. *I think the draft law is unconstitutional and I don't want any war.* I don't care who goes to war. Anybody that wants to go can go; *I never stopped anybody. I don't want to fight for England. England got this country into the war.* I recognize that the legally constituted authorities of our country are the ones to settle the question of war. I believe in the system of government that requires us to elect officers by vote and then those officers perform their duties under the law. *I think it was unconstitutional for Congress to pass this law.* I did not solicit John Murphy to join the American Patriots. *This organization was organized just to test the constitution. I guess every man was going to test it just as I was. They were going to put a test case through. While it was being tested I suppose I would have to get out a writ of habeas corpus and get out on bail or go to jail. IF IT WAS CONSTITUTIONAL I WAS READY TO GO TO WAR. Everybody has his own rights. I did not obstruct any law.* (Tr. p. 165, fol. 262.)

I based my belief and had in mind a statement of President Wilson. I took it out of the "Examiner". I read the "Examiner." At the time it was published that was in my mind at the time. (Tr. p. 165, fol. 262.) I took it yesterday from the Examiner of October 18, 1913. It is this official declaration I referred to when I told the jury I based my opinion on what I read in the Examiner.

At this point the District Court ruled that IT WAS WHOLLY IMMATERIAL. The statement so excluded was as follows:

"U. S. Ambassador Page in delivering a speech at the unveiling of an obelisk in the esplanade at Southampton, England, said: *'In spite of the great fusion of races and of the great contributions which other nations have made to the hundred millions of people across the sea, and to her incalculable wealth, THE UNITED STATES IS YET ENGLISH LED AND ENGLISH RULED.'* " (Tr. p. 165, fol. 263.)

John Murphy, a government witness, testified Sept. 13, 1919, (Tr. p. 18, fol. 29) as follows: I am 26 years of age, have taken out my first citizenship papers, and registered for the draft; was notified to appear for examination on *Monday Aug. 6, 1917,* receiving the notice the Wednesday before; met the defendant Carey on Thursday and asked him if he was notified to go before the physical examination board, he said yes, but he *did not think he would go.* I told him I had the same notice, and he asked me if I was going, and I said I did not know and he said you come with me and I will fix you up. I went with him down to the Mechanics Building on Market Street *and joined the American Patriots; I did not talk to anybody.* Carey just said he took me down to join the American Patriots and said he got another friend to join the organization and told me if I joined it would be all right, and I joined and paid $6.00. On Thursday the first day, the man to whom I paid the money (Dr. Hoffman) told me to go to Mr. O'Connell. I went to Mr. O'Connell's office and gave him the notice I got from the board and never got it back. Mr. Carey went with me to Mr. O'Connell's office. I had no conversation with Mr. O'Connell and I forgot what he said. *He gave me a paper to fill out my exemption claim* and file that exemption claim. I signed U. S. exhibit No. 10, exemption claim that day. Daniel O'Connell *gave it to me and TOLD*

ME TO READ IT CAREFULLY and take it out to the *physical examination board that same Saturday evening and leave it with the board and to be sure to go before them for the physical examination on Monday, THAT WAS ALL HE SAID. He said to take the physical examination* but not to sign any papers *out there at that board;* he never told me why; he did not say a word to me about the oath. *I NEVER HAD SEEN O'CONNELL PRIOR TO THAT SATURDAY I WENT TO HIS OFFICE. I read the paper over* but I didn't know what it meant. I read that paper but I did not understand it at all. I told Mr. O'Connell I had a father and mother in Ireland, partially depending upon me for support and to a certain extent that was true; I send them $30.00 or $40.00 once in a while; it must be five or six months since I sent them that all at once; MR. O'CONNELL ASKED ME ABOUT THESE FACTS BEFORE HE PUT THEM ON THE PAPER. I can read and write the English language and understand it when I read it. Once in a while I read the daily newspapers and understand them when I read them. *I was not trying to keep out of war* but I was thinking that paper might save me from going *before the exemption board,* but I did not know whether it would or not. *I thought the paper might keep me from being EXAMINED. Mr. O'Connell told me to be sure and report for physical EXAMINATION ON MONDAY,* (Tr. p. 41, fols. 69, 70) but on Monday morning I saw my name in the paper about this exemption claim put in and I got scared and did not go that morning. I was frightened from what I read in the Monday morning newspapers. I read it and understood it myself and that was the only reason I did not go to take the examination. (Tr. p. 42, fol. 70.) The next day, Tuesday, I saw that a warrant was sworn out for me and on Wednesday I went down and saw Mrs. Adams, the assistant District Attorney and explained the case to her and told her I

was ready to take the physical examination and she told me to go and take the examination and *I went and took the examination AND THE CASE AGAINST ME WAS DISMISSED.*

Mr. O'Connell might have said to me that I should go up and have another day set and take the examination, but I don't remember it. *In answer to my question whether or not Mr. O'Connell thought* they would have me arrested on Monday morning, *Mr. O'Connell said I was right, that I would be arrested;* that he thought we did the right thing not going out there that we might be arrested. UP TO THE TIME I REFUSED TO GO MR. O'CONNELL'S INSTRUCTIONS TO BE SURE AND GO WERE STILL GOOD AND WHEN I DID NOT GO AND TAKE THE EXAMINATION, WHETHER FOR FEAR OF BEING ARRESTED OF FOR ANY OTHER REASON, I WAS VIOLATING MR. O'CONNELL'S INSTRUCTIONS TO ME. (Tr. p. 42, fol. 72.)

I never saw Mr. O'Connell before (Saturday) August 4, 1917, and have known Carey *by eyesight* for twelve months. (Tr. p. 43, fol. 73.) *When I talked with Mr. O'Connell at his office on SATURDAY THERE WERE PRESENT MR. CAREY, MICHAEL DONLON AND MYSELF and there was a conversation going on among the four of us. I did not understand the conversation and don't remember anything of it. During the conversation Mr. O'Connell was sitting at the desk, and the three were sitting at one side of the desk.* The next time I saw Mr. O'Connell was between 11 and 12 o'clock Monday forenoon when Carey and myself went into Mr. O'Connell's office. *I was to report at the examination board at 8 o'clock that morning and had plenty of time to go and be examined and get down to Mr. O'Connell's office between 11 and 12.* (Tr. p. 42, fol. 71.)

I don't know that Mr. O'Connell said why not to sign papers, or about being put in the military service,

or that if we were in the military service we could not appeal to the civil courts, as the reason not to sign any papers that would put me in the military service: *he may have said something. I don't know now what he said;* if he did I cannot remember what he said; I did not understand *what he was saying DURING ALL THE TALK GOING ON BETWEEN MR. CAREY, MR. DONLON AND MR. O'CONNELL WHILE I WAS PRESENT.* I don't remember asking an explanation of anything, nor did I at any time say that I did not understand what they were saying or talking about. *WHEN I FIRST CAME TO MR. O'CONNELL I told him that I was ready to fight for the United States any time, BUT I WAS DETERMINED I WOULD NEVER FIGHT FOR ENGLAND; THAT WAS MY DETERMINATION THEN AND SO I TOLD HIM REPEATEDLY.* I did not understand that at the time being whether it was to fight for England or the United States. (Tr. p. 43, fol. 73.)

I was never told what the American Patriots were. Mr. Carey took me down there and told me about it, to join them and it would be all right. Carey took me over and introduced me to Mr. O'Connell and then handed Mr. O'Connell my notification slip. Once in a while I read the daily newspapers and understand them when I read them, and know from reading them that the war was going on and that the United States was at war with Germany *but did not know that the draft act was passed, or that it was before Congress.* (Tr. p. 41, fol. 70.)

August 4, 1917, John Murphy paid $6.00 to the American Patriots for initiation fee and dues for September. (Tr. p. 40, fol. 68.)

Michael Donlon, a government witness, testified (Tr. p. 20, fol. 34) as follows: I am 28 years of age, not a citizen; have taken out my first papers. *I first sought Mr. O'Connell for legal advice. I wanted to*

have a talk with him. I did not know he was connected with the American Patriots at all, and I did not know that he had anything to do with them; it was before I signed the Patriots. I cannot tell the date. I WAS DETERMINED NOT TO BE DRAFTED. I told Mr. O'Connell that I objected to the draft on account of thinking it was in favor of England and that I did not want to take up arms at that particular time. I TOLD HIM THAT I WAS WILLING TO FIGHT FOR THE UNITED STATES AT ANY TIME, but I said I was not willing to take part in the European war, *on the ground of England being in it; THAT WAS MY OBJECT AND MY ONLY OBJECT FOR EVADING OR TRYING TO TEST IT,* or having anything to do with it at all. I JOINED THE AMERICAN PATRIOTS TO TEST IT, to see if I could have any chance of keeping out of the war. I don't know that they have ever commenced any proceedings or taken any steps to protect anybody. (Tr. pp. 72, 73, fol. 118.)

I was arrested and am out on bail now, *AND DETERMINED TO TEST THE CONSTITUTIONALITY OF THE DRAFT ACT, AND THAT IS WHY I AM FIGHTING THAT CASE. THAT HAS BEEN MY DETERMINAION ALL ALONG BEFORE I EVER HEARD OF THE AMERICAN PATRIOTS. THE FACT THAT I FOUND THE AMERICAN PATRIOTS IN EXISTENCE AFTERWARDS, did not have anything to do with my determination, except in a certain degree; IF I DID NOT TRY IT THAT WAY I INTENDED TO TRY IT IN SOME OTHER WAY. I THOUGHT IT WAS A LEGAL WAY OF GOING ABOUT IT.* (Tr. p. 73, fol. 118.)

I had a talk with Mr. O'Connell *on two or three occasions;* I was alone the first time *and the second time there were two more with me, John Murphy and Mr. Carey, the defendant.* I told him that my folks lived on 30 acres, that there was a family of 12 of us that

lived on 30 acres in Ireland AND HAD WORKED FROM EARLY MORNING UNTIL LATE AT NIGHT, AND WE COULD NOT GET ENOUGH TO LIVE ON, OWING TO ENGLAND TAKING THE STUFF AWAY FROM OUR FARM. THE CONDITION IS that my father had to work 30 acres of land back there, and he had four sons of us, and himself and we were all working the land and all made a poor living of it, *AND I got prejudiced* against England and I never would take up arms and never would do anything in her favor EVEN UNDER THE PENALTY OF DEATH, or whatever it might be, I don't know what it might be; I SAID I NEVER WOULD ASSIST HER IN ANY FORM UNDER THE PENALTY OF DEATH. THAT IS HOW I FELT ABOUT IT BEFORE I EVER SAW MR. O'CONNELL OR THE AMERICAN PATRIOTS OR ANYBODY ELSE. (Tr. p. 74, fol. 120.)

Mr. O'Connell I think he said to me, that he did not blame me and would not blame any Irishman ON THEM GROUNDS. (Tr. p. 74, fol 120.)

At my first talk with Mr. O'Connell I said I was an Irishman and didn't want to fight for England; he said he didn't blame me, nor would he want any Irishman, or something like that. He said he was an Irishman; in substance he said: "I don't blame you, I would not want any Irishman to." I had reference to the present war. I was trying to keep out of the army *under the conditions of the conscription act.* I was wanting to keep out of the army of the United States BECAUSE I HAD DECIDED IN MY VIEW THAT IT WOULD BE HELPING ENGLAND. Mr. O'Connell said he did not want to see any Irishman fight UNDER THOSE CONDITIONS and did not blame me. (Tr. p. 73, fol. 119.) I told Mr. O'Connell that I did not want to comply with the conscription, as I thought it was in favor of England, and that I did not want to take up arms at that time FOR THAT

CAUSE, BUT THAT I WAS WILLING TO FIGHT FOR THE UNITED STATES. (Tr. p. 74, fol. 120.)

I saw Mr. O'Connell before I went for examination and *he told me to go ahead and take the physical examination but not to sign any papers or take any oath that would put me into the military law.* He told me that by taking the oath, *IF I WANTED TO TEST IT tha. I would have to go, and would not have any way out of it if I took the oath. HE TOLD ME THAT TAKING THE OATH WOULD PUT ME IN THE MILITARY SERVICE AS AN ENLISTED MAN AND NOT A DRAFTED MAN.* (Tr. p. 73, fol. 119.)

When I got the notice to report for military service, I went to Mr. O'Connell's office (Tr. p. 73, fol. 119)—I think it was on Tuesday I was supposed to appear and I saw Mr. O'Connell on Monday, a week ago yesterday. I told him I got my final notice to appear at my district board in the morning, and Mr. O'Connell said to me, "Donlon, do you want to go?" I said that I didn't. "Well," he says, "*It's up to you, if you want to go now,*" *OR TEST THE CASE. I told him I was willing to take the consequences, TO TEST THE CASE, OR DO WHAT I COULD ABOUT IT.* (Tr. p. 73, fol. 120.)

I have refused to go. Mr. O'Connell is my lawyer. MR. O'CONNELL HAD NOTHING TO DO WITH MY GOING OR NOT GOING. MR. O'CONNELL SAID TO ME THAT EVERYBODY WHO WANTED TO ENLIST SHOULD ENLIST, AND THAT IT WAS THEIR DUTY TO ENLIST. HE ALSO SAID THAT THESE NEWSPAPER MEN AND OTHER PEOPLE WHO WERE ADVOCATING WAR SHOULD BE FORCED TO GO TO WAR THEMSELVES. (Tr. p. 72, fol. 118.)

I was arrested at my home and taken down to the Marshal's office. I have taken no other steps to test the law. Mr. O'Connell has not told me what steps he is going to take. I left my case in his hands. I

have talked with Mr. Carey and some fellows around here about my case and Mr. Carey told me to please myself, to do what I thought fit, but did not tell me what he was going to do. I never asked Mr. O'Connell why he had not started a suit. (Tr. pp. 73, 74, fols. 119, 120.) I am now defending this case on which I am out on bail *and have instructed Mr. O'Connell to defend it, and he has informed me that the case would have to be BROUGHT TO THE SUPREME COURT OF THE UNITED STATES IN ALL PROBABILITY, and the constitutionality would be set up at the trial, so that the record could be prepared sufficiently to present it to THE SUPREME COURT OF THE UNITED STATES, AND THE UNCONSTITUTIONALITY OF THE DRAFT ACT IS TO BE THE DEFENSE IN THAT CASE ON WHICH I AM OUT ON BAIL.* (Tr. p. 74, fol. 121.)

Thomas McGuire, a government witness, testified Sept. 14, 1917, (Tr. p. 19, fol. 31) as follows: I am clerk of the local board under the draft act for division No. 4 of San Francisco, Cal., and was present when John Murphy and Thomas Carey *together presented claims for exemption, the O'Connell claims;* (witness identified the claim presented by Carey and it was offered and admitted in evidence and marked U. S. exhibit 19 *and is precisely the same words as that presented by Murphy.*) I read the paper over twice. I read the Murphy claim once; I asked them if they understood the meaning of the contents and they said no; they said they were told to take it out there and leave it. I asked them if they read it and they said no; I told them that under the law I could accept only the form of *affidavit* prescribed by the law and volunteered twice to give them any *form of affidavit that would suit their case* but they would not take it, and *I told them a second time we would not take their claims,* but Mr. Carey said: "Well, I am going to leave

it here." *I told him I would not take it* and he said: "Well, you can put it in the waste paper basket." I warned them to come back for the *physical examination on Monday morning, August 6, and they both said they would be there.* (Tr. p. 43, fol. 73.) *THERE IS NO BLANK PROVIDING FOR SUCH A CLAIM OF EXEMPTION SUCH AS MR. CAREY AND MR. MURPHY FILED; NO FORM CONTEMPLATED ANY OBJECTIONS SUCH AS THEY INTERPOSED.* (Tr. p. 44, fol. 74.)

Thomas Carey, defendant, further testified as follows: I was afterwards at the O'Connell office *with John Murphy* who testified here. I met Mr. Murphy on August 3rd at McSweeney's saloon. Murphy was reading *a card for his physical examination.* After I looked at the card I said I had one myself. So we were talking. No one knew where the board met and *I said I would like to go there and file A CLAIM OF EXEMPTION THAT DANIEL O'CONNELL IS GETTING READY FOR ME. I told him I belonged to the American Patriots and he said he would like to belong to that himself AND TEST THE CONSTITUTIONALITY OF THE LAW.* That he did not want to go back and fight for England, but he was ALWAYS READY TO FIGHT FOR AMERICA. I then said if you want to know where the office is, it is 741 Mechanics Building. Murphy said, "Ain't you going down there today?" I said, "Yes", and he said, "I will meet you an hour from now and go down with you." We met afterwards and took a jitney down to the American Patriots, where he joined and then we went over to Mr. O'Connell's office *where I was going for the exemption claim and Mr. O'Connell said he would fix the two claims for Saturday as long as we're going on the same day and we could take the physical examination Monday. On Saturday we came after the two exemption claims and went out and filed them and made a date to meet at half past seven Mon-*

day morning and go down together and take the physical examination. Monday morning it came out in the newspapers that we were going to be put in jail and I said I ain't going to take any chances on that. Murphy said, "I ain't either." We went down that day to Mr. O'Connell's office and told him what we had seen, and I suppose he had seen it before, and he said, "You did right; you will have plenty of time to go and make another date some day and take the examination." I think Murphy and myself were down to Mr. O'Connell's office one day after that, Monday of August 6th, 1917. *Mr O'Connell suggested to Murphy that we have* another date and go back and take the physical examination. *Mr. Donlon was there the same day.* I cannot remember what Murphy said in answer to the suggestion of Mr. O'Connell. I took the physical examination last Thursday, September 20th. On the 6th of August when we did go down to Mr. O'Connell's office he said it was just as well we did not go as I could get another date fixed to go. (Tr. p. 163, fol. 259.) *I have been condemned as physically unfit by the board.* (Tr. p. 164, fol 259.) I first learned of the American Patriots at a meeting in Dreamland Rink in July, where I saw in a card, distributed the address in Mechanics Building. (Tr. p. 164.)

Russell L. Dunn, testified as follows: I remember the time when the O'Connell claim of exemption was prepared and when I first saw it. I saw the prosecution's exhibit Nos. 19 and 10 *before the blanks were filled in, and before it was finally prepared.* I contributed to its final preparation after I saw it. I added something to it. Mr. O'Connell in preparation of those documents which are the Carey and Murphy claims as filed by them, showed them to me late in July and asked me what I thought of them. I asked, "What is the purpose of it?" He answered, "It is a claim of exemption." I told him it needed revision. I suggested corrections here and there. *Mr. Carey was*

present when it was handed to me, or immediately before. Mr. O'Connell said the last paragraph in that claim of exemption has to be there in order to state the cause of the applicant filing the claim. He said that he would make the amendments which I suggested. There was quite a conversation between us over the last paragraph. *He said it had to be there to give the reason or show the occasion of making the claim of exemption.* We discussed the constitutionality of the law at that time in connection with the suggestion which I made as to certain amendments which he accepted. *Mr. O'Connell said he thought the draft act was unconstitutional on the grounds stated in these documents.* I had frequent conversations with him over these questions of draft. (Tr. p. 121, fol. 194.)

My business is advising corporations, attorneys, engineers, and others on the subject of which I assume to be conversant. I am not a member of the bar. (Tr. p. 122.)

Jacob M. Hinchman, a witness for the government, testified Sept. 18, 1917. (Tr. p. 20, fol. 34), as follows:

Sometime in July or August I first heard of the American Patriots, cannot say, but it might have been at some Dreamland Rink meetings. Mr. O'Connell spoke at one meeting on "True American Patriotism." I cannot say just what he said. I was up to some meeting afterwards and attended the American Patriots meeting in the Assembly of the Pacific Building. Mr. O'Connell spoke twice. He said in his opinion the draft act was unconstitutional; he didn't mention anything of what would become of me while he was testing the case; he did not ask my permission to use my name to test the law or anybody's name. I don't know whether he ever commenced any proceedings of any kind to test the law; I did not ask him when he was going to start proceedings to test the law. *My idea in joining the American Patriots was simply to test the consti-*

tutionality of the Act. I have read the circular; *I was of the opinion that the law was not constitutional, that was my own idea about it.* I have not studied law *but I was of the opinion that the conscription act was unconstitutional. Nobody solicited me to join the American Patriots;* I saw a circular letter from the American Patriots; I read it through, and it was my opinion too, and I thought it would be *best to join them as I was not rich enough to be able to test it myself.* I did not think I would be getting the service of an attorney by this entrance fee and $1.00 a month; *I was under the impression and am now,* that the draft act *is unconstitutional. After I read the circular letter stating that the American Patriots were willing to test the constitutionaliy of the law I thought it—for me to join them because I am not rich enough to stand it myself to do the testing.* (Tr. p. 69, fol. 113.)

The paper you handed me is the circular I read. I got that circular and read it over and after a little consideration I thought I would join. I don't know that there is any suit pending now on behalf of the American Patriots to test the law; I am kept informed as to what the American Patriots are doing and I have not as yet heard of any such suit. I don't know what the circular means and what it says; I did not go as deeply into it *as to think* that it was organized for the purpose of testing every executive act of the President and every act of every member of his cabinet, or of the military authorities, or any act of Congress relating to the prosecution of the present law; I THOUGHT IT APPLIED TO THE CONSCRIPTION ACT IN REGARD TO SERVICE ABROAD; there are certain other points there in the circular which the American Patriots make. (Tr. p. 70, fol. 115.)

I heard Mr. O'Connell at these meetings in the Pacific Building *state that he believed that everybody who wanted to enlist should enlist, THAT IT WAS THEIR*

DUTY TO ENLIST, and that every person who advocated war, especially the newspaper people and the editors and other public speakers should be made to go to war first; AND THAT IT WAS ONLY FOR THOSE PEOPLE WHO HAD CONSCIENTIOUS OBJECTIONS AND WHO DETERMINED IN THE FIRST PLACE NOT TO ENLIST, AND ALSO TO TEST THE CONSTITUTIONALITY OF THE DRAFT ACT; THAT THE ORGANIZATION HAD NOTHING TO DO WITH ONLY THOSE PEOPLE. He also advocated that the constitution should be changed so that we should not have any war again unless the people voted for it in the first place. (Tr. p. 71, fol. 117.) HE ALSO SAID IN THESE SPEECHES THAT HE STOOD PAT on the statement of the President to the Senate on January 22nd of this year, "Peace at once without victory." (Tr. p. 72, fol. 117.)

He also said that there was no victory in war; that whoever won always lost; he showed by history that there was always a loss; that Napoleon was victorious and almost conquered the world, but still it was a war of aggression, and he referred to the history of Alexander the Great and to Louis XIV, and that all of their victories amounted to nothing. (Tr. p. 72, fol 117.)

I have done nothing other than file this claim of exemption with the district board. I registered and took the examination, and *that is all I have done besides filing the claim.* I have made no threats against anybody *or stopped anybody else from enlisting.* Nobody explained this claim to me at the time I took it; it was lying on a table in the office of the American Patriots; the boy was there, probably he gave it to me; it was none of the defendants; it was in the office of the American Patriots in the Mechanics Building. I have not filed any other claim of exemption; I have not supported it by any affidavits of any kind; have

not prepared any affidavits and do not expect to. (Tr. p. 71, fols. 116-117.)

Nobody advised me to take the physical examination; I went and took it myself because I did not see anything wrong in it, just the same as I did not see anything wrong in the registration and I registered (Tr. p. 70, fol. 115.)

The exemption claim that I filed contained language at the bottom of it, which charged that the British government is running our government. I don't believe that, *but I did not care for a word or so whether it was correct or not correct;* it was the sense that I understood. I FILED THE PETITION TO CLAIM THAT I THOUGHT THE LAW WAS UNCONSTITUTIONAL. I read over the exemption claim, not so carefully, but I was satisfied with the contents of it and signed it. *I understood it thoroughly; I got it at the office of the American Patriots myself, and read it, and whether the words in it were correct or not THE WHOLE POINT WITH ME WAS TESTING THE CONSTITUTIONALITY OF THE CONSCRITPTION ACT.* (Tr. p. 71, fol. 115.)

THIS IS MY OPINION that we are not in any danger to the United States as expressed in the claim of exemption. I am judging the case myself and decided in my own mind that it was unnecessary for the United States to go to war, and I was against war. Some of the things stated in the claim of exemption I know; there are lots of things that are not proper, that are lies published in the newspapers; IT IS MY OPINION that there cannot be any danger to the United States. IF ANYBODY WANTS TO START ANYTHING LET THEM START IT, THEY WOULD NOT NEED ANY CONSCRIPTION AT ALL. CERTAINLY I BELIEVE that this war is a war of aggression, conquest, and greed and that this is not a war of defense. (Tr. p. 71, fol. 116.)

I am 29 years of age, born in Poland, Russia, and

my nationality is Hebrew. I have been in this country eleven years and no family. I have been a citizen nearly five years; have been notified by the exemption boards to appear before them for examination; I joined the American Patriots before I appeared; *I filed an O'Connell exemption claim and paid my entrance fee to the American Patriots before I did. My purpose in joining this organization was merely to test the constitutionality of the draft act; it did not mean that I wanted or did not want to go to war. I thought I had a right to question the constitutionality, and I expressed that to the exemption board. I thought Mr. O'Connell was the best lawyer to have it tested. I thought by joining the Patriots that would have hired Mr. O'Connell to take my case;* I did not know whether I would be put into the military service while the test was going on or not. *I have been physically examined and pronounced fit, but not notified to appear.* (Tr. p. 68, fol. 112.) *If the law is declared constitutional and held valid I will be willing to enter the service.* (Tr. p. 70, fol. 114.)

Alfred Westfeld, a government witness, testified Sept. 18, 1917, (Tr. p. 20, fol. 33), as follows:

I am a citizen, born in California, age 21 years, and am a truck driver by occupation; am duly registered and physically examined and have not yet been notified to appear for service, but am expecting to be. I joined the American Patriots August 20th. I filed the O'Connell claim of exemption Aug. 20; that is the one shown to me, U. S. Exhibit 24. I have not yet signified my intention to refuse to go. I have not yet decided what I am going to do. MY PURPOSE IN JOINING THE AMERICAN PATRIOTS WAS TO HAVE THE CONSTITUTIONALITY OF THE DRAFT ACT TESTED IN COURT. (Tr. p. 78, fol. 127.)

There was a meeting at Dreamland Rink where Senator Works and Mr. Mills were speaking. They col-

lected something like $500 at that meeting, that is why I joined the American Patriots, and I joined because I thought they were real patriots, but that meeting was the first and only time I heard of them. I joined two or three days after that meeting. Joe Lane joined at the same time. (Tr. p. 79, fol. 128.)

I did not ask what steps had been taken or whether any would be taken to have the act tested when I joined. I have not been interested enough to see whether any steps would be taken, and have made no inquiries about it. No one asked for the privilege of using my name or petition to start any case. I am not *trying to avoid military service.* I joined the American Patriots to have the constitutionality of the draft act tested in court. (Tr. p. 78, fol. 127.)

The reason that I did not want to go to war without being made to go is that I have relations over there and would not like to fight against them; I am of German descent. I did not say that I did not intend to go. (Tr. p. 79, fol. 128.)

I am not willing to go under those conditions. It is the truth that I am not going. I did not join the American Patriots to see if the American Patriots could keep from being made to go, but I don't want to go unless I am made to go. I DID NOT JOIN THE AMERICAN PATRIOTS THINKING THEY WOULD KEEP ME FROM GOING. THE ONLY REASON I JOINED WAS TO HAVE IT TESTED IN COURT, to see if I had to go, that was to avoid the necessity of going. I never engaged Mr. O'Connell as a lawyer; I have talked with him a few times; have never asked him if I would report for service when needed, and never asked him what I am to do if I am notified to appear, *as I decided to do what my own mind tells me WHEN I AM CALLED.* I don't know whether I will send for Mr. O'Connell or not if I am called. I invested my $5.00 *in the organization, but not with Mr. O'Connell.* It is all right for the Ameri-

can Patriots to circulate this literature and carry on their propaganda. I don't know how much money is in the treasury of the corporation called the American Patriots. (Tr. pp. 78, 79, fols. 127, 128.)

The meeting where I first heard about the American Patriots was a meeting under the auspices of the Peoples' Council of Democracy, at which Senator Works and Colonel Wood and David Star Jordan spoke. Mr. O'Connell spoke for a few minutes. *Mr. O'Connell had been arrested before I joined the American Patriots.* (Tr. p. 79, fol. 128.)

Joseph A. Lane, a government witness, testified September 18, 1917 (Tr. p. 20, fol. 33) as follows:

I was born and raised in San Francisco, of French parentage; I filed one of the O'Connell claims of exemption on *August 21, 1917;* (U. S. Exhibit 25.) I had not heard whether Mr. O'Connell was arrested or not.

I was prompted to join the American Patriots by the talk I heard at a meeting at Dreamland Rink, AS MY OPINION WAS THE SAME OF THOSE OF THE SPEAKERS. I JOINED THE ORGANIZATION BECAUSE THEY HAD THE SAME VIEWS THAT I HAD. The speakers were Colonel Woods, Rev. Mr. Whitaker and Mr. O'Connell. (Tr. p. 79, fol. 129.) I heard Senator Works, David Star Jordan make their speeches that night at Dreamland Rink, and *I heard Senator Works declare that in his opinion THE DRAFT ACT WAS UNCONSTITUTIONAL. I heard him say that that claim was presented to Congress before it was passed; AND THAT WHILE A GREAT MANY SENATORS AGREED WITH IT, THEY SAID IT WAS TOO LATE NOW.* One of these circulars such as Exhibit 11, is the one that this man showed me on the car, and I read it over before joining the organization, *and my views were the same as those, THAT IS WHY I JOINED IT.* (Tr. p. 81, fol. 131.)

I got that piece of literature from a fellow on the

street talking with me, and he told me it was a good organization to join; I did not know him at all; I do not know his name. (Tr. p. 80, fol. 130.)

I bought one of the small books about the constitution that they were selling at the Peoples' Council meeting. I got the book at their meeting at Commandery Hall. (Tr. p. 79, fol. 129.) I think it was a meeting of the Peoples' Council. Mr. O'Connell was presiding. Nobody talked to me about the Patriots. I heard them spoken of before that at a meeting; they were all talking about it in general, all giving a different version of it; I am not sure that they referred to it as a corporation, but they were talking about it at a meeting over at Dreamland Rink. The speakers were talking about the war and that it was not a just war, and all that. *I had my mind made up BEFORE I WENT OVER THERE TO THE MEETING that I will fight for America in America.* Colonel Woods was talking about the war, and *Mr. O'Connell was telling about the constitution,* and I thought they had the same opinion that I had, so joined the American Patriots. *I went to the meeting of my own accord,* and after hearing these two addresses and finding they coincided with my own views, *AND READING THESE PAMPHLETS I decided to join the American Patriots;* I just joined the organization *because they have the same idea as I have. I just wanted to put my shoulder to the wheel and contribute to a cause that I concurred in; I just wanted to join the organization, and I am not asking anybody else whether they wanted to join or not. I understood the money is to be used to test the constitutionality of the new laws;* I cannot say how much they have on hand or what they did with the money. I was not thinking I was employing any attorney when I joined. I heard people talk and *say that they would have to be tested in the higher courts;* I was not told how or when. I heard some say that I would probably be in jail and others say I would be

out on bail *when they were testing these laws.* As far as I have anything to say, I object to being shot into the army; may be I cannot stop them throwing me into the army though; I don't believe in fighting over there (Tr. p. 80, fol. 130); I will fight for America in America; I will defend the country in case of invasion. I want to defend my country. According to the constitution that I read, it states that any American being drafted in the army, is to be kept in his country here in case of invasion; I saw something in the constitution about that. *I bought one of the small books about the constitution* that they were selling at the Peoples Council meeting; *I got the book at their meeting* at Commandery Hall. *It stated that if they drafted a man in the army they should draft him only for this country. If a man enlisted voluntarily they can send him any place they wish. I read the constitution and have always heard that the constitution states that any man being drafted in the army is supposed to fight and defend America in case of invasion. I object to drafting men and sending them abroad. We have ships here to defend the coast; I am not saying that I would not go if I enlisted; as a drafted man I object to going to Europe, or any foreign country to fight; if I am drafted I will fight on the soil here, BUT IF THE CONSTITUTION STATES WE SHOULD, I WILL CHANGE MY VIEWS.* I did not exactly think I would get the relief I am speaking about, *by joining the American Patriots.*

At this point *at the request of the United States Attorney, the two books the witness said he read* were produced and delivered to the United States Attorney. The witness resumed his testimony as follows:

This is what I read: "Cannot be taken beyond the limits." This is a quotation from the address of Hannis Taylor, being one of the two produced by witness and delivered to U. S. Attorney. The witness reads as follows: "BY AN EXPRESS PROHI-

BITION OF THE CONSTITUTION CONSTRUED BY THE SUPREME COURT OF THE UNITED STATES 90 YEARS AGO, NO PART OF THE NATIONAL MILITIA CAN BE TAKEN OUTSIDE OF THE UNITED STATES." (Tr. p. 80, fol. 80.)

Alfred Westerfeld, again testified, September 20, 1917, this time as a witness for the defense, as follows:

When I went to Mr. O'Connell's office to file one of those, I asked for one of those exemption blanks. I was not going to take the examination, but I asked Mr. O'Connell about it and he said: "Yes, you take the examination, because it is legal." So then I went down and took the examination; I think it was about three days after I joined. I asked him about certain papers to sign, and he said there is a little narrow paper that is all right to sign; if there are any others read them over carefully and if you don't want to sign them tell them you will bring down to Mr. O'Connell, that you want to show them to him before you sign them. That is about all I think was said. (Tr. p. 112, fol. 181.)

I was arrested when I was subpoenaed as a witness for the government in the court room and Mr. Lane also subpoenaed as a witness for the government was arrested at the same time in the court room. (Tr. p. 114.) Before Mr. Preston had summoned him to his office and interrogated him as a witness for the government and asked him what good he thought he was going to get out of joining the American Patriots. *And I told him I joined it to have the constitutionality of the draft act tested in court.* (Tr. p. 113, fol. 181.)

Christopher McCullough, a government witness, testified, September 18, 1917, (Tr. p. 20, fol. 34), as follows:

I was required to register and was also notified to appear for physical examination, and I filled out one of the O'Connell exemption claims, and was instantly arrested at the time I filed it. My idea in asking for one of these O'Connell claims was *I thought the law*

was unconstitutional, and I wanted to file it in the form of a conscientious objection in the hope that the Board would pass on it as a sufficient ground of objection, or else throw it away. I read the exemption claim, especially the last part about England, and the claim that we were pulling their chestnuts out of the fire, and I let it go. *I signed the paper and* I personally endorse those doctrines in it; to a certain extent I did think that our country has been subsidized, or overpowered, or become the tool of somebody else, and we don't know how to run our own business over here. I did not think they were going to give *everybody* who filed these exemption claims a test case; I thought it was going to be decided in Washington. *The mere filing* of that paper I did not think was going to do me any good. (Tr. p. 81.)

I wanted to take the physical examination, but these officers would not allow me. I presented this form to the clerk and *the clerk said it was no good and it could not be presented unless it was on a regular government form.* I said I will leave it here and you can suit yourself what you will do with it. *In less than a minute after I filed this* the chairman of the Board called me and said: "Officer, put this man under arrest." They took me down to the city prison; I was held without bail and they would not allow anybody to talk to me and my brother sued out a writ of habeas corpus and brought me before the Superior Court and then they made a complaint against me charging me with conspiracy with Mr. O'Connell; my brother caused suit to be brought against the officers who caused my arrest; after I dropped the suit for false imprisonment I believe they ordered me rejected for a physical disability. (Tr. p. 182, fol. 133.)

RESULTS OF FOREGOING EVIDENCE.

The foregoing is *all the evidence on the second alleged overt act.* From all *that undisputed evidence*

plainly appears the following UNCONTRADICTED FACTS:

1. The *reason* for making the claim of exemption was to *raise the question of jurisdiction and the constitutionality of the draft act at the earliest stage in the proceedings.*

2. The *reason* for putting in the last sentence of the claim of exemption was to show *why* he, Thomas Carey, was claiming the exemption, and so that none would think he was not *ready and willing to fight FOR THE UNITED STATES.*

3. It is all *one continuous sentence and, if one part is offensive IT IS OFFSET BY THE OTHER PART.*

3. It was the *spontaneous individual expression of three Irishmen* first made by *one*, and *adopted by all three at the same time, the case of the second and third, being precisely the same as the first case.*

4. None of the defendants, except the lawyer defendant and Carey, had anything to do with it, or knew anything about it. It was peculiarly a lawyer's work *preparing* the claim.

5. It was not done *in pursuance* of any agreement, or understanding, as it was *not finished until the day it was filed* by the defendants Carey and Murphy, and was started but a few days before at *the request of defendant Carey alone*, and *for him alone, and the others knew nothing about it.*

6. *It could only be done* in pursuance of that object and purpose *of the corporation* calling for the testing of the constitutionality of the draft act and the jurisdiction of the officers to enforce it, *IF it was not the INDIVIDUAL CASES of Thomas Carey and John Murphy.*

7. That part of the last sentence which it is claimed was offensive *could not constitute a crime*, and is plainly protected by the first amendment to the Constitution of the United States. But the charge is *conspiracy*—not offensive *phrases.*

8. It was the *honest opinion* of the persons making them, and the form was afterwards *adopted* by the Patriots, and was *not intended for any persons except filing with the board, and none others saw them.*

9. It was an absolutely *private filing* and *no publicity was required* and *none made,* by the defendants.

10. *It must be assumed to be true and to have been done and filed in good faith as* evidence of the truth and good faith were *excluded* as being *wholly immaterial.*

11. This Court will *not* consider them true or false, as that was a question for the jury, and *no evidence that they were false* was offered, and all evidence that they were true, or well founded was excluded.

12. These claims were *actually filed by only eight persons,* Carey, Murphy, Donlon, McCullough, Hirschman, Wacker, Westerfeld and Lane; two of them are now defendants, and *all eight were members* of the *American Patriots.*

13. *ONLY those eight persons, and two other members, Mettler and Christman, EVER RECEIVED ANY* of those claims.

14. *Everyone* of them received and filed the claim *ONLY FOR THE PURPOSE OF TESTING THE CONSTITUTIONALITY OF THE DRAFT ACT.*

15. Everyone of them *had PREVIOUSLY determined for himself that the draft act was unconstitutional and that he was going to contest it, and the alleged offensive phrase had no effect upon his mind, BUT NEARLY ALL OF THEM BELIEVED THEM TO BE TRUE.*

16. Any conspiracy *commenced July 12, 1917 and ended with the arrest of the defendants August 6, 1917,* and during that time claims of exemption were *filed only by three, Carey, Murphy and Donlon.* Wacker *received* his on August 6, 1917 but did not *file it until August 7, 1917.*

ALL THE EVIDENCE ON THIRD OVERT ACT— MR. O'CONNELL GOING TO LODI AUGUST 4, 1917.

GOVERNMENT'S EVIDENCE.

Rev. Wm. C. Mengedoth testified: I first met the defendant Daniel O'Connell the first part of August 1917, because his name appeared on the letterhead of the American Union Against Militarism, as the counsel for California, which was how I got the information he was interested and my first intercourse with Mr. O'Connell by sending him a letter and at the same time sending a similar letter to Mr. Dunn, who was the attorney for Oakland; the letter stated that he had conscientious objectors who refused to bear arms and asked what the procedure was as to them, the letter was dated July 23, 1917, and Mr. O'Connell answered that the draft law was unconstitutional and had to be tested by judge and jury and the proper thing to do was to file a proper exemption affidavit, and advised them to join the American Patriots. These persons, most of whom members of his church, asked him about the American Patriots, and he said he did not know anything about it, and could not tell them whether to join or not to join, and they requested him to come to San Francisco and find out from Mr. O'Connell and others about the American Patriots; he came to San Francisco and inquired about Mr. O'Connell (Tr. p. 34, fol. 59) and saw Mr. O'Connell and told him there were boys who wanted to join the American Patriots and requested Mr. O'Connell to write to them *as they wanted to see Mr. O'Connell and hear him speak personally. I asked him if he would come over to Lodi and address the boys or see the boys and Mr. O'Connell said he was willing to see the boys.* He said the American Patriots was a corporation and with that message I went home. I believe that he suggested that he write one instead

of more and that he would come down and speak to *them or see them.* The kind of relief they wanted from the American Patriots was *to know about the constitutionality of the draft, and that is what I told Mr. O'Connell in his office at that time. I asked him if the draft act was legal or constitutional, or something like that. HE SAID TO ME THAT HAD TO BE TESTED IN COURT.* I said to Mr. O'Connell, "How is it about fees?" He said the entrance fee would be $5.00 and $1.00 monthly for the reason that *this fight to test the law in Court would be too much for one person, but by all co-operating it would be easier to do that.* He wrote something on the top of one of the application blanks that it would be $5.00 initiation fee and $1.00 a month and *that one alone could not test it in Court but co-operating together they would be able to do so. He stated that it would be too much for a poor man.* I carried *back to my people* the message that Mr. O'Connell had suggested that he would come to Lodi and make a speech. I didn't arrange for him to come to Lodi and make a speech, that was later on. (Tr. p. 35.) In the beginning after they were registered *I wrote out some conscientious objections* for them from the religious *standpoint before I had talked or knew anything of Mr. O'Connell, and my talk with him had nothing to do with the paper I had wrote* (Tr. p. 36.) *These boys wanted me to go to Mr. O'Connell about the testing of the constitutionality of ihe draft act.* I never saw Mr. O'Connell at any time until I went to his office about August 1, 1917, and Mr. O'Connell never said anything to me except what I have previously told here. *The suggestion that Mr. O'Connell come to Lodi was first made by the people in Lodi and I carried the message to* (Tr. p. 37) *Mr. O'Connell and said to Mr. O'Connell that there were so many questions asked of me that I could not think of them all and the best way was to go up and let the public and everybody ask*

questions. There were 120 members in Lodi who had paid in full. (Tr. p. 38, fol. 65.)

Henry Christman, government witness testified: Mr. Mengedoth was not present when I came to the office in San Francisco with Adam Mettler, Billy Snobell and Bill Mettler, five of us; all of us went to Mr. O'Connell's office; we talked with him about coming up and making a speech at Lodi because there was a number of boys up there and he would tell us how everything would be. They said they would like to have him come up and speak at Lodi about the American Patriots and explain what it was about. *Mr. O'Connell said if we wanted to test the law he would help. I wanted the law tested;* I did not think the war was right and *I did not want to go to war. He told us we might be in jail while the test was being made in the Courts.* (Tr. p. 61.)

The official reporter of the district attorney's office at Stockton, at the request and direction of the district attorney, reported the speech delivered at Lodi, Cal., August 4, 1917, and a transcript of that report was produced by the government and marked for identification as U. S. Exhibit "A", for identification, but not offered in evidence by the government. (Tr. p. 45, fol. 76) Later the defendant Daniel O'Connell offered it in evidence as a part of the defense, but the government objected to its admission in evidence, and after argument it was finally admitted in evidence and marked Defendants' exhibit A. (Tr. p. 114, fol. 183) but owing to the haste with which the case was closed to accommodate a Jewish juryman who wanted to go to religious services, the speech was not read to the jury. The chairman announced at the beginning of the meeting that Mr. O'Connell would answer questions and Mr. O'Connell announced a request for questions and he would answer them and after the speech he answered a number of questions and a collection was taken up. (Tr. pp. 45, 46, fol. 76; p. 57, fol. 94.)

Three government witnesses testified of what took place at that meeting in Lodi, which testimony was as follows:

Henry Christman testified:

I heard his speech in Lodi and was in his room before the speech was made. Mr. O'Connell in my presence before we went before the exemption board, told us in his office, that if we wanted to test the law, we should not take the oath, and we could take our physical examination, but that we should know what we were signing and not sign anything that puts us in the military service. He said the reason why it was best to take the physical examination was that we might not be fit to go and that we would be all over the thing if we were not fit. He did not say that we would not have to go to jail; *he said that we should sign every paper that would not put us in the service.* (Tr. p. 61, fol. 101). We took up a collection at the Lodi meeting for the expenses we had there; I can't tell how much was collected. I helped to take up the collection but paid no more attention to it. (Tr. p. 62, fol. 102.) *At that meeting that night at Lodi, I heard Mr. O'Connell say in answer to somebody's question "Everybody should follow the law and take every legal step required by the Act."* I couldn't just say when he said it but *I know he said it.* At that meeting there were young, old and middle-aged people, *and they were all asking questions from the different parts of the hall; there were quite a few questions; somewhere around about 25. All of the questions received some sort of an answer.* Somebody asked about taking the examination Monday morning, and *Mr. O'Connell told them to go and take it, and he followed that up by saying "Take every step required by the law."* (Tr. p. 62, fol. 102.) Yes I understood Mr. O'Connell told me not to take the oath or sign any papers. That is what I understood by the law. I remember Mr. O'Connell answering that those taking the examination, if they do not want to be put in the

military service, *if they want to test the law they must remain under the civil law* and therefore when they take the physical examination, if they want to remain under the civil law not to take the oath that would put them in the military service." (Tr. p. 63, fol. 103.)

Adam Mettler testified:

"I was at the Lodi meeting, and also in Mr. O'Connell's room at the hotel, and on the platform after the meeting. I paid my money before the meeting. Mr. O'Connell in my presence said, I should not take the oath *if I wanted the law tested*, he said not to sign any papers that would put me in the military service. (Tr. p. 59, fol. 97). I applauded his speech and heard distinctly everything he said. It was in his speech from the platform that I heard about not signing papers or taking the oath. *He said if I wanted to test the law we had better not take the oath*, and about signing papers. (Tr. p. 60, fol. 98). "If I would not take any oath, they would have me arrested and they would have to leave me out on bonds until the law was tested, *or something like that;* that is the way I understood it in the speech; *it was to go to the Supreme Court of the United States to be tested. Mr. O'Connell said the Court was in vacation until October,* and with the other cases before, we would not get a *decision* in this case until *about January or February FROM THE SUPREME COURT OF THE UNITED STATES*, on account of the other cases before it. That is what I understood about keeping me out of jail until the case was decided *and if the law was unconstitutional that would change things.* Mr. O'Connell told me to go and take the examination; I had already registered. *He told everybody up there at Lodi to take the examination, and to follow every legal step, to take the legal course.*" (Tr. p. 60, fol. 99).

Ashley Turner testified:

"I am a newspaper reporter and on August 4th, at-

tended a meeting in Lodi at which Daniel O'Connell made an address, and I heard the questions propounded to him and the answers he gave at the conclusion of the meeting after he made the address. *I did not make any notes, other than the notes in my mind.* I didn't take down the language, because at that time I was not going out covering many stories, and I have a good memory, and just took short notes to guide me, but did not take down the exact language." (Tr. p. 57, fol. 94.)

"I had a talk with Mr. Dolley; *Mr. Dolly was ONE of the secret service men from San Francisco.* I wrote the report that appeared in the Stockton Mail the next day. I wrote the headline of the items that appeared in the Stockton Mail about the meeting on that Saturday, August 4th, before it was held." (Tr. p. 58, fol. 96).

"The subject of the questions propounded and the answers given by Mr. O'Connell which I heard were as follows:

"Now Mr. O'Connell, in case we go to the exemption board, what shall we do; shall we refuse to take the examination?" He said, "No I would not advise you to refuse to take the examination but refuse to take the oath." *He explained that* by saying that as long as they took no oath they would not be under the jurisdiction of the military authorities, and prosecution that might follow if they took no federal oath would be a civil prosecution. Later another man asked: "What would you advise us to do in case we go there to be examined and refuse to take the oath and they arrest us?" Mr. O'Connell's reply was, *I am not positive* that the word "jail" was used, but he said they would be under the civil law jurisdiction and the merits of their case would have to be *tried out individually* and that new Congress would be elected soon and that a new Congress would be overwhelmingly against the draft law, which would be repealed, and his advice to them was to refuse to take any oath

but to consent to an examination." (Tr. p. 57, fol. 94).

"*Something* was said at the meeting about the writ of *habeas corpus*. Somebody asked the question, suppose a man goes to take the examination and he is seized by the military authorities, how is he going to get out? Mr. O'Connell said that he must appeal to the Court for a writ of *habeas corpus, and have the legality of his seizure tested in Court;* (Tr. p. 58, fol. 96). *and that if they took the oath that put them in as a member of the military or naval service, that they were subject to military law and not to civil law, and could not apply for writ of habeas corpus,* AND FOR THAT REASON, *if they wanted to remain under the civil law,* they must not take the oath." (Tr. p. 59, fol. 97).

"What did he say about signing any papers if anything?" "A. He said to sign no paper whatsoever." "What other questions?" A. "A number of questions as to 'how long it would take you to get out of town,' *and so forth,* and 'where is your American flag?'"

One question was "Who do you want to win the war?" And Mr. O'Connell, *after a moment,* said, "I don't want anybody to win the war," and he stamped his foot, and said, "I want it stopped." (Tr. pp. 57, 58, fols. 94). Mr. O'Connell asked the man who spoke about winning the war, what he meant by winning the war, and Mr. O'Connell said that he did not see how anybody won, that there never was a good war, and never was a bad peace, and if they went on and piled up all of our young men dead, he didn't consider that winning." (Tr. p. 59, fol. 97).

During his speech he said the men who left the United States for Europe would not return; he said the average life of a soldier in the trenches was 48 hours; *as near as I can remember* were just *about* as follows: "Every intelligent person here knows that

these young fellows who go across the ocean will never come back. We know that the average life in the trenches is about 48 hours. I wonder if it is 48 hours with those machine guns on both sides throwing bullets so fast that when a man throws up his head he is gone, and when they stick up their bodies to run across 'no man's land' to the other trenches, you wonder how they ever last 48 hours in the trenches. Every one of these young men who go will never come back—there may be some who may but we don't know." (Tr. p. 58, fol. 95). "He did mention a large number of test cases he was going to start; he did not state how many. *As I understood it,* it was a number of cases and he would bring them up individually and collectively,*each case would be a separate one.* (Tr. p. 58, fol. 95). When it was said about a large number of cases Mr. O'Connell said that the question was being raised all over the country, in New York and other places, and that those would all go to Washington, and probably would be *argued together by the best counsel in the United States, who said that this law was unconstitutional and that they were confident of having, the Supreme Court so decide.* Hannis Taylor, former Ambassador to Spain, and an authority on Constitutional law was mentioned, and Daniel Webster several times too. (Tr. p. 59, fol. 97).

Someone in the back of the hall said, By the time that gets to the Supreme Court the war will be over, or words to that effect." (Tr. p. 58, fol. 95) "The tenor of the question of the man who asked about the delay of the Supreme Court was that it would involve such delays that these fellows would be taken over there and would be fighting before the case got to the Supreme Court. The question implied that it would take it so long to get it THROUGH the Supreme Court that they would be over there in Europe before the case was DECIDED, or before it got to the Supreme Court. Mr. O'Connell answered, "BROTHER, I HAVE MORE CONFIDENCE IN THE SU-

PREME COURT THAN YOU HAVE." (Tr. p. 59, fol. 97). Mr. O'Connell said "I have more confidence in the Supreme Court brother than you have," *which caused a little laugh. I think three or four months were mentioned as the time it would take this case to*—the Supreme Court. Mr. O'Connell said in his speech that it would cost about $5,000 to take it to the Supreme Court, *provided he got nothing for his services.* In my own mind I am positive that he said that the worst that would happen to a man ordered into the service before he got through with his test case would be that he would stay in jail *until it was decided* or be out on bond, but that the new Congress would be elected soon and it would repeal the draft act, which he claimed was unconstitutional (Tr. p. 58, fol. 96). Mr. O'Connell spoke of it as not a war of defense, and that the Constitution did not allow them to take soldiers out of the country. (Tr. p. 59, fol 97).

The foregoing is *all the evidence* of how Mr. O'Connell came to go to Lodi; his *purpose* in going there, and *what was said or done at Lodi, Cal.,* charged as the third overt act in both counts of the indictment.

COMMENT.

1. It plainly appears that the trip to Lodi was on *a personal invitation to Mr. O'Connell as the lawyer of the corporation, American Patriots, at least 120 members of which corporation resided at Lodi and wanted to ask numerous questions about the American Patriots and the constitutionality of the draft Act.*

2. If it was not a *personal* affair, *then it was only in pursuance of the objects and purposes of the CORPORATION, and not of any of the conspiracies alleged in the indictments.*

3. The speech was so correct that no fault could be found with it.

4. If there was any offensive or outside remarks

made in *answering questions, it could not be in pursuance of any conspiracy.*

5. Any such offensive remark does not come within the meaning of the Espionage of *June 15, 1917.*

6. Any such remark comes within the protection of free speech in the First Amendment to the Constitution.

7. All the remarks show *only a purpose to test the constitutionality of the draft act as quickly as possible and A POSITIVE CONVICTION THAT IT WAS UNCONSTITUTIONAL TO COMPEL MILITARY SERVICE IN A FOREIGN COUNTRY AND THAT THE SUPREME COURT OF THE UNITED STATES WOULD SO DECIDE in January or February 1918.* The estimate of time was good as this Court decided one phase Jan. 7, 1918, and this phase May 6, 1918.

8. It was all conversation, counsel and clients interrupted by ruffians on the outside and not clients.

ALL THE EVIDENCE ON THE LEGAL OPINION —FOURTH OVERT ACT.

(Tr. p. 4, fol 6; p. 6, fol. 9.)

All the evidence on the subject of the legal opinion is as follows :

W. C. Mengedoth, a government witness, testified: "About August 1st, my second trip, I got the legal opinion in Mr. O'Connell's office, *or the adjoining office, it was on a desk or around there, somewhere;* I don't know what I did with it. Some of it was typewritten and some written. I believe I gave it back to Mr. O'Connell. There was something written in handwriting in different places. I was not interested in it at all." (Mr. O'Connell then produced the opinion which the witness identified as the one in question, which was then offered in evidence and read to the jury and marked U. S. Exhibit No. 1.) "I did not show it to anybody. I took it home because it was a legal opinion. This was on Monday; I got home

Tuesday night, about one o'clock and had to leave early next morning for Fresno, and had no time to show it to the boys, although I intended to show it to them." (Tr. p. 316, fol. 61.)

Mattie M. Barkley, a government witness, testified: "I am a stenographer in the same building where Daniel O'Connell has his office. I typed copies of the legal opinion Exhibit No. 1, but *I did that for Mr. Yost who has an office adjoining Mr. O'Connell,* having the same entrance room. I made a few *copies and gave them to Mr. Yost.*" (Tr. p. 63, fol. 87.)

Wm. A. Gray, a government witness, testified: "I am an accountant and *have known Dr. Hoffman 2½ years* and Mr. O'Connell and Mr. Wacker *since August 2, 1917*; I worked on the books until 10 P. M. that night; I concluded my labors about August 10 or 11th. *The first day I was at the office I went of my own volition to Mr. Allen, one of the special agents in the Bureau of Investigation of the Department of Justice, he was in charge during Mr. Rathbun's absence from the city; I told him that I was opening the books but was not in sympathy with the movement; I did not tell Dr. Hoffman that I went to see Mr. Allen,* but I *told Dr. Hoffman not to say anything in my presence that I might have to testify against him. Mr. Allen told me to go on and finish the books, that is all that I remember that he said;* that first night I worked until about ten o'clock then I went down to the hall in the Pacific Building where there was a meeting of the American Patriots; I stopped work August 12; *I saw one copy on the desk and one copy in the drawer of the legal opinion and advice on the conscription law; one I believe had the seal of the American Patriots on it; there were no signatures on them.*" (Tr. pp. 63, 64, 65, fols. 102, 105, 107).

EVIDENCE OF DEFENCE ON LEGAL OPINION

Daniel Yost testified: "My law offices are in the Pacific Building next to Mr. O'Connell. Mrs. Krause

and Mrs. Manley *came in to see me;* they said they had attended the meeting in Dreamland Rink. Mrs. Krause said she had two sons or two nephews; that she was very much exercised and had not been able to sleep nights, and Mrs. Manley was also interested. I took them into Mr. O'Connell's office *after a preliminary talk with them.* Mrs. Krause said, 'Well, what can be done?' Mr. O'Connell and myself discussed the constitutionality of the draft act on many occasions. (Tr. p. 125, fol. 200.) I had a conversation with Mr. O'Connell upon the best method of testing the draft act and the opinion Mr. O'Connell gave was that men who were drafted would be arrested and that then the method would be to sue out a writ of habeas corpus It was a lawyers talk furnishing authorities, etc. At the preliminary meeting it was agreed to form a corporation the next day. *Mrs. Manley and Mrs. Krause and the rest of them were to report at my office the next morning."* (Tr. p. 126, fol. 202.) Many times Mr. O'Connell and myself were in accord on one feature of the unconstitutionality of this act, *but there was one other that I was in doubt about and I am in doubt about now,* and we would talk these things over. (Tr. p. 127, fol. 203.) *I shared a reception room with Mr. O'Connell since March.* We had two cases together. They were the Cohen and Gambo cases. *About August 4, I ceased to use Mr. O'Connell's reception room.* On the night of July 4, I read the declaration of Independence and then spoke about it in the Dreamland Rink. I never saw the legal opinion presented here. Miss Barclay is entirely in error when she says she typed the document at my request. (Tr. p. 127, fol. 204.) We went into the question very thoroughly. This law has not been adjudicated. *I have on opinion that this law is unconstitutional and I have the United States Supreme Court for my authority. I was interested in seeing a test case because I had been written from New York that Hannis Taylor was bringing a*

test case in New York. I said I was willing to make a test case, but I didn't care for a collective proposition on it. *As a lawyer I was willing to test the case. I stood ready at any to make a test case. That is where we split. I know that Mr. O'Connell had a collection of authorities on his desk, and was testing the constitutionality of this draft law night and day, making it a special study.* I attended the preliminary meeting of the American Patriots in the assembly hall of the Pacific Building. (Tr. p. 128, fol. 205.) *He argued his way and I argued mine. Mr. O'Connell and myself read the Espionage act together. At a meeting subsequent to the July 4th meeting at Dreamland Rink, as chairman I expressed the opinion that the draft act was unconstitutional.* (Tr. p. 129, fol. 207.) *There were others who came in to test the constitutionality of the law outside the American Patriots,* and all those who came in and consulted about it declared they were determined to test the law before ever they saw Mr. O'Connell *or myself,* and that they were not going to war, that it was unconstitutional." (Tr. p. 131, fol. 209.)

David J. Smith testified: "I didn't see the legal opinion nor any of the circulars or any of the documents issued by the American Patriots until it was produced in court at this trial." (Tr. p. 143, fol. 229.)

Herman B. Smith testified: "I never heard or saw the legal opinion until it was introduced in court here; I have never seen or heard of the exemption claim except through the newspapers after they were filed, and I never heard it read complete until here in court." (Tr. p. 161, fol. 256.)

Thomas Carey testified: "I didn't see the motion pictures or the legal opinion. All the members of the American Patriots I know of are these defendants." (Tr. p. 164, fol. 260.)

Dr. E. R. Hoffman testified: *"I never saw the opinion given to Mr. Mengedoth and produced in Court un-*

lil it was produced in Court." (Tr. p. 141, fol. 226.) *I did have a copy of the opinion on hand in the office not under seal. I did not show it to anybody. Nobody showed it to my knowledge. It was there as a matter of information to myself. There was no particular use I could make of it. The legal opinion does not express the objects of the organization. I made no use of the opinion. I did not have it there for any purpose at all. I did not bring it into the office. I think it was brought there by young Serbin who acted as our clerk and when he put the seal on it I asked him why he did that. It was the mere playful act of a child. Mr. O'Connell prepared the opinion in answer to the questions. The legal opinion does not state the initial purpose of the corporation. Those questions were asked him by a party and they were replied to.* I haven't any opinion on the correctness of the law stated in that opinion." (Tr. p. 139, fols. 22, 223.)

"I understand the legal opinion to mean that if a man refused to be conscripted under the Selective Service Draft Act he committed nothing but a misdemeanor if the law was valid and that after having served the sentence imposed his liability to military service ends then and there under the law. I did not show this legal opinion to members or to anybody outside of those who were in the office with me. *It was in the office.*" (Tr. p. 137, fol. 219).

"*All the books and papers have been delivered to the Court under subpoena from the district attorney.* Everything is shown on the books. (Tr. p. 133, fol. 213). I heard the testimony of Miss Barkley. She never prepared any petitions for me, or for the American Patriots." (Tr. p. 137, fol. 219).

Louis Serbin, testified: "I was 17 years of age August 20, 1917. I saw the legal opinion which was presented to me by Mr. O'Connell *for the benefit of members that came up to the headquarters. I kept it in the desk* and sometimes I offered to members and

sometimes I did not and *when I read it I put it back in the desk again. Mr. O'Connell had instructed me to send anybody who wanted legal advice on the subject to him.*" (Tr. p. 110, fol. 177.)

Carl J. F. Wacker testified: "*I saw one legal opinion,* just glanced at it, *and had not seen it before I had filed my exemption claim. I had to join the American Patriots before I received any advice from Mr. O'Connell. He gave me no advice until after I had joined; then I went back to his office and talked to him. I have been secretary since August 13; I produce here all the records and correspondence that I had of the corporation.* Up to August 13; when I had spare time I helped Louis Serbin. After I became secretary Louis took his orders from Dr. Hoffman and myself. *Mr. O'Connell is the legal adviser of the corporation; he is the attorney for the American Patriots; I am a member.* After I became a member of the American Patriots I went down to Mr. O'Connell for advice in regard to the examination and signing of papers. (Tr. pp. 115, 118, fols. 184, 189).

Edgar C. Walker, testified that he was a director and third vice-president of the American Patriots, and further testified: "*I saw the legal opinion;* I don't know whether it is correct or not; I am not a constitutional lawyer myself. I did not take the legal opinion to any attorney to ask whether or not it was the law or do not know whether any member of the corporation did so. I do not know that the opinion was circulated at all. *I simply saw one at the offices of the American Patriots. I do not know that any changes were made in it later after rulings were made by General Crowder.* I understood that this legal opinion that the United States attorney has read was given in answer to certain questions put to Mr. O'Connell by Mr. Mengendoth and some others, and that Mr. O'Connell was simply answering the questions that they put to him. I do not think that the contents of

that legal opinion is sufficient in itself to invite forcible resistance to the Draft Act. *I know what is in the opinion.* I don't think as an officer of this corporation that the only effect that would have on a young man of draft age would be to place his mind in such a condition that he would feel warranted in resisting the law, even to the extent of force; as this young man has been advised to go and report and take the physical examination. I don't think either that that part of the opinion which reads "If they refuse to go are they under military law? They are not. Can the military authorities proceed against them? What can be done for such refusal to be conscripted?", has the inevitable tendency or the tendency of such languages just read to me was to have the mind of the young man reading it, to turn away from the law and be in the proper frame of mind to resist it. I don't believe that this is a sinister attempt to place the information in the mind of the drafted man so that he will be lead to refuse to accept the notice to come to military service. I believe that it is calculated to give such a man more confidence in this organization. It is not calculated in my opinion to stay his hand, to steady his nerve, to resist the law."

RESULTING FACTS.

From the foregoing, which *is all the evidence on the subject of the* legal opinion, the following facts plainly appear:

1. The government had closed its case with the testimony of the witnesses Mengedoth, Barkley, and Gray on this point, and that left it that Mr. Yost had Miss Barclay type the legal opinion for Mr. Yost and returned to him, and typed for him a few copies of it, and that he had the adjoining offices to Mr. O'Connell and that on or about August 1, Mr. Mengedoth found a legal opinion partly typewritten and partly in handwriting and picked it up and took it away with him, and he did not have an opportunity to show it to any-

body and after some days he returned it to Mr. O'Connell and on request at the trial Mr. O'Connell produced the paper and it was put in evidence. Between August 2, and August 11, 1917 the witness Gray in the employ of the secret service of the Department of Justice, but apparently working as a friend and accountant of Dr. Hoffman at the headquarters of the American Patriots saw two copies of a legal opinion one with a seal on, but he did not identfy the one put in evidence as a copy, or as one of those two.

2. The evidence *tends to show* that the copy put in evidence was prepared by attorney Daniel Yost, and was in an uncompleted, partially corrected, state.

3. The evidence *conclusively shows* that the opinion at the headquarters of the American Patriots was ***not the opinion put in evidence.***

4. There is *not a particle of evidence* of any part of the opinion used by the American Patriots at their headquarters, or what it contained.

5. There is *not a particle of evidence* that it was "admitted to have been prepared by the defendant O'Connell, a copy of which has been put in evidence."

6. Those portions of that legal opinion quoted by the judge in his charge were directly contradictory of the advice given by Mr. O'Connell at the meetings and at other times and to all persons in July and August which was to present themselvs for the physical examination and present their claims of exemption at that time. (Tr. p. 104, fol. 168.)

7. There is *not a particle of evidence* to show, that it was "put out and furnished by the defendants through the American Patriots and those in its employ to people who came to its office."

8. There was *not a particle of evidence* that it or any opinion was ever distributed, or circulated, or "put out and furnished", to any one.

9. *The evidence shows that there was no basis whatever* for the categorical statements made by the

judge about the legal opinion *in the charge to the jury.* 10 *That evidence shows* that such a statement in his charge is sufficient ground for reversal of the judgment.

EVIDENCE OF OTHER THAN THE ALLEGED OVERT ACTS.

Subject to objection and exception of defendants that there was no proof of a conspiracy and no proper foundation laid and that it was immaterial, irrelevant and incompetent, the following evidence offered by the government (Tr. p. 39, fols. 66, 67) was admitted:

The United States Attorney then offered in evidence a slide *to be thrown* on the screen in moving picture theaters, being a picture of the signing of the Declaration of Independence with pictures of Daniel Webster and George Washington, and requesting persons to join the American Patriots, alleging that Congress was violating the Constitution of the United States.

"The United States Attorney then offered in evidence *a list* of the theaters and places where said picture was shown (to which offer the defendants objected on the same grounds,) but the Court overruled the objection and admitted the evidence *and it was read to the jury.*" (Tr. p. 39.)

There was no evidence offered that they were in fact thrown on any screen or shown.

Albert J. McCarthy, a government witness, testified:

I am a police officer. I recognize the photograph shown me as the photograph of a wagon I locked up on August 6, 1917. I saw it circulating on the streets of San Francisco. I noticed it on Seventh street right opposite the postoffice. The order came from the chief's office that night to lock up the driver and the wagon for disturbing the peace. The photograph was then put in evidence as U. S. Exhibit No. 8 and was a photograph of a wagon and the inscription on three sides reading: "John Bull is Ruling and Ruining Us.

What Are you doing About it? Join the American Patriots, 714 Mechanics Building."

William J. Mowry, a witness for the government, testified September 13, 1917, (Tr. p. 18, fol. 29), as follows:

I reside at Colma, San Mateo County, Cal. I am a pharmacist and have an establishment in Colma and know the defendant, Dr. Hoffman, and had several conversations with him on the draft question, about a month and a half ago had a conversation with him in which the question of the exemption affidavit was discussed with him; I am within the draft age, but not yet drafted.

Subject to the objection and exception of defendants, the witness further testified as follows:

Dr. Hoffman came into the store and handed be a couple of membership blanks in the American Patriots, such as U. S. Exhibit 11, and said: "What do you think of them Bill? Just sign one of them. Here, sign this." That was the whole conversation. I said: "I will think it over. I don't think much of that. No, I don't care to sign it Doc." I took the paper, but I threw it away later; later I saw Dr. Hoffman lots of times and would say: "Well, Doc, how is it going along?" And he would answer: "Oh, it is coming along fine." Or something in that respect. At one time I said: "Well, I think that before you could prove that law unconstitutional, all the boys would be in France." He said they wouldn't; they would bring them over there, and when they would go to take them on the boat at New York, there would be an injunction or some other paper signed that would stop them, that would keep them out of it; that would prevent them from going. Nothing was said about contributing money; he told me it was $5.00 for the first and $1.00 a month after that; he said the money *was to be used to make the legal fight* and for the advertising and the expenses of the organization; he told me this when he

first handed me papers to sign; in this injunction proposition *I STARTED in to talk with him in regard to it,* and I said: "Well, Doc, this does not look to me to be plausible. I think you are being made a fool of with this thing, because *I says I know you to be a fellow that when you BELIEVE anything you go to it too strong.*" He says: "Well, I will tell you Bill, I BELIEVE THAT THIS LAW IS UNCONSTITUTIONAL." I says: "Even if it is, they are going to get you there before the law is proven unconstitutional," And he says: "Why, we can get an injunction and that will hold the men here until it is proven; it has to be proven first." He never said how many cases they were going to start to test this law, or how many injunctions would be necessary, or whether there would be an injunction for each man. I have known Dr. Hoffman two and a half years, he wanted me to join, but I did not join the American Patriots. My conversation with him was the date these membership blanks were printed; the second conversation was three or four days afterward *when we argued about the constitutionality* of taking the men away. I only had these conversations with him; Dr. Hoffman at no time solicited any one in my presence. He told me about another member in that community, J. P. Moresco, a drafted man, who told me he had joined; Dr. Hoffman also told me that he had solicited him and that he joined. (Tr. pp. 44, 45.)

William A. Gray, a government witness, testified September 18, 1917, (Tr. p. 20, fol. 34), as follows:

I reside at Salada Beach, San Mateo County and I am an accountant, and I am acquainted with Dr. Hoffman and Mr. O'Connell and Mr. Wacker since August 2, 1917, when I was asked by Dr. Hoffman to open a set of books for the American Patriots. It was simply a mere service to Dr. Hoffman; about 10 o'clock that night in the Mechanics Building, then went to the hall in the Pacific Building where there was a

meeting of the American Patriots. On the same day I met Mr. O'Connell in the office of the American Patriots in the Mechanics Building. There were about 30 or 40 present at the meeting, and I should judge about 10 or 15 per cent of them were within the draft age. I heard Mr. O'Connell address the persons present at the meeting. I don't remember exactly what Mr. O'Connell said, there were a great many different remarks made at the meeting; *one of the things was that they needed money to carry on the purposes of the organization, and that if they took the oath they would be under the military authorities,* or in the jurisdiction of the military authorities. *He stated that they desired this money for the purpose of carrying on the American Patriots; THE PURPOSE AS EXPLAINED BY HIM WAS TO TEST THE CONSTITUTIONALITY OF THE DRAFT ACT.* (Tr. p. 63, fol. 104.)

The point was made that all they could get was one year in jail *while testing the act.* I discussed the matter with Dr. Hoffman several times and he said THE PURPOSES OF THIS ORGANIZATION, AMERICAN PATRIOTS, WAS TO TEST THE CONSTITUTIONALITY OF THE DRAFT ACT. (Tr. p. 63, fol. 104.)

I saw at the office a list of names of four or five pages, about 150 names on the list and they were not members of the organization. Mr. Wacker prepared and mailed literature to the names and addresses on this list, it was the same U. S. Exhibit 11, and the envelopes were Mr. O'Connell's personal envelopes the same as U. S. Exhibit No. 2, and were mailed out by Mr. Serbin. *This is all the literature I know of being mailed out.* I should judge at two different times 300 or 400 pieces of literature were sent out. U. S. Exhibit No. 21 put in evidence at this time were two of those letters postmarked August 5, 1917, and on the left hand of the envelopes was *printed*

Daniel O'Connell, attorney at law, 944 Pacific Building, San Francisco.

While I was there working, Dr. Hoffman and Mr. Serbin, a boy about 15 years of age, had charge of the office. Mr. Serbin while Dr. Hoffman was away. (Tr. p. 64, fol. 105.). There were no circulars sent out other than those I have identified, so far as I know. I saw Mr. O'Connell but twice at the office; he was there about 15 minutes in all. (Tr. p. 66, fol. 108.)

When these people came in they would ask what the object of the organization was, and Dr. Hoffman would hand them one of those circulars and then if they paid they were sent to Mr. O'Connell for advice. I heard some of those young men tell Dr. Hoffman that they did not want to go to war. *In answer to that Dr. Hoffman would tell them that there was ONLY ONE WAY to do and that was TO TEST THE CONSTITUTIONALITY OF THE ACT.* If they joined the organization they were then sent to Mr. O'Connell or taken to Mr. O'Connell. Mr. Wacker would take care of the office part of the time during the absence of Dr. Hoffman. *I tried to dissuade Dr. Hoffman from this organization, BUT HE THOUGHT MR. O'CONNELL'S INTERPRETATION OF THE LAW WAS CORRECT.* I told Dr. Hoffman that I did not think the organization was clean BUT HE SEEMED TO THINK THAT MR. O'CONNELL'S MOTIVES WERE OF THE BEST. (Tr. p. 64, fol. 105.)

I am a close friend of Dr. Hoffman and associate. The first day I was at the office I went of my own volition to Mr. Allen, one of the Special Agents in the Bureau of Investigation of the Department of Justice; he was in charge in the absence of Mr. Rathburn from the city. *I did not tell Dr. Hoffman that I went to see Mr. Allen,* but I told Dr. Hoffman not to say anything in my presence *that I might have to testify against him;* I went back to work on the books August 4th; I stopped on August 12th; *I was not being paid for working on*

the books and there was nothing to prevent me stopping the work at any time, but Dr. Hoffman asked me to continue; *part of my work was done at Dr. Hoffman's house; I never told Dr. Hoffman or any of his family or anybody connected with him that I had been to see Mr. Allen.* (Tr. p. 65.)

I saw Mr. O'Connell at one meeting in the Pacific Building; the door of the Assembly Hall was wide open; everybody was admitted; nobody accosted me when I came in, or asked me if I had any right, and nobody was accosted when they came in. *The occasion of Mr. O'Connell saying anything was that some asked a question* as to whether they should take the oath; *the substance of what I heard was if they took the oath habeas corpus proceedings could not be instituted because they were under the military authorities.*

Louis Serbin testified: I sent them circulars (U. S. Ex. 11) out to certain addresses and *in envelopes which I found at Mr. O'Connell's offices* and thought it would save the funds of the organization *if I used them.* They were marked on the outside 937 Pacific Building *but Mr. O'Connell's address was 943 Pacific Building. There were several boxes of these envelopes unused and had not been opened and I took them myself and used them.* (Tr. pp. 109, 110, fol. 177.)

E. C. Walker, testified September 19, 20, 1917, (Tr. pp. 26, 27) for the defence as follows:

I live in San Francisco, Cal. My business is a writer of short stories and scenarios; I attended some of the meetings of the American Patriots. I heard Daniel O'Connell speak on *the subject of the purposes of the organization.* The first meeting I attended, I believe, was the first after its incorporation. It was in the assembly hall of the Pacific Building, the door was wide open, everybody was admitted, there was nobody at the door. I had cognizance of the meeting of the American Patriots; knew where it was to take place,

and I went there and found the door open and entered, *not knowing anybody in the place, never met any of the people before.* After a few minutes the meeting was called to order informally and Mr. O'Connell spoke to those present, saying that the organization of the American Patriots had been incorporated and those present had been invited to join as members of the organization. I cannot recall whether it was stated at that time what the precise purpose of the organization were, except that the circular letter which first came into my possession *set forth the articles of incorporation of the American Patriots,* and it was told at that time that we were to become members of the organization *to carry through what was set forth in the circular, NOT TO CONTEST THE CONSTITUTION, BUT TO UPHOLD THE CONSTITUTION OF THE UNITED STATES.* There may have been something said about testing the constitutionality of the law, but I don't recollect it. *One of these circulars was read at the meeting,* the circulars were distributed; there was a call for those present to come forward and take one; I had received a circular before I went there. I attended a meeting at Dreamland Rink at which Mrs. Skeffington spoke. In the foyer of the rink I was handed one of those circular letters as I came out. Mr. O'Connell presided at the meeting of the American Patriots in the Pacific Building, and Miss Malley was acting secretary. *One of those present requested that Mr. O'Connell speak more definitely concerning the corporation. Mr. O'Connell said those present were gathered together to perfect an organization which would be strong enough to carry on a fight in the courts in testing the constitutionality of the draft law. Something was said upon the subject of enlistment or the duty to enlist;* I cannot recall anything said on the subject of the draft. I have attended all of the meetings but one or two. *Mr. O'Connell stated that the Government had a perfect right to cause to be registered either*

the young man or any other particular division of the people of the United States at any time, that it might be looked upon as a sort of census; he stated that he thought it perfectly proper at that time to register, and that they should register, although it was long past the date required for registration and that every man should present himself for physical examination, and present his claim of exemption at that time. That same statement was made at different times and in different speeches. Some of these meetings were in the month of July. I was present at the meeting at which the officers were elected, and one or two meetings before. I cannot recall whether these statements were made before or after the officers were elected, *but I am sure statements were made before the date set for the examination. Mr. O'Connell said that he believed that this draft law was unconstitutional, and that he believed it would be declared unconstitutional and void, AND THIS ORGANIZATION WAS FORMULATED FOR THE PURPOSE OF UPHOLDING THE CONSTITUTION AND TESTING THE CONSCRIPTION LAW. I remember that he quoted from Daniel Webster on the subject of the constitutionality of the law; and said it was THE DUTY of any man who felt like enlisting to enlist, and that the editors of this gagged lying press should be made first to go to fight;* also that it would cost a large sum of money to bring this case go to the Supreme Court, where evidently it would go some time. I think at least $5000 was mentioned. That the case would have to be handled by very able and competent lawyers in Washington. *I never heard Mr. O'Connell use the word obstructing.*

I am 33 years old and joined the American Patriots at the first meeting and am a director and third vice-president, but have not performed any duties as vice-president; am cognizant of the internal affairs of the corporation; have not been opposing the draft act;

have felt and do feel that the draft act is unconstitutional, and am willing *to lend my efforts to test it.*

Mr. O'Connell is not prosecuting any case to the Supreme Court that I know of, he did not tell me that he had numerous opportunities to sue out a writ of habeas corpus to test this act. I know of his defending people here in jail. I never asked Mr. O'Connell why he did not bring an injunction suit and enjoin some of these draft boards from performing their duty under the law. I did not ask him what advice he was giving about those who had been advised to report for military service, because I had heard him state without having to ask, that when a man was drafted he was to present his affidavit and take his examination; I did not ask him what the man should do after being examined and accepted and notified to appear. (Tr. pp. 103, 104.)

I did not hear any young man ask Mr. O'Connell at any time whether he should report for military service after he had been found physically fit for service, and it never occurred to me to ask such a question. Mr. O'Connell said that when a drafted man had been notified to appear he would be taken care of automatically *through the fact of his having claimed exemption in there; that the military authorities would in all probability arrest him, and that it would be necessary to have the young man turned over to the civil courts. I am not clear on those things because my interest was aside, not being drafted myself.* It is a fact that they are conducting a compaign for the purpose of getting members, and they are being sought among the drafted men as well as any other place. One young man should refuse to report in order that they might make a test case of it. I cannot say what they were going to do with the others; my position is more or less honorary *and I am not in touch with the legal end of it and with all the objects of the corporation. It is my understanding that the corporation is formed not to*

prevent anybody from being drafted, but for THE PURPOSE OF FINDING OUT WHETHER THEY CAN BE MADE TO ENTER THE MILITARY SERVICE OF THE UNITED STATES AND GO ACROSS THE WATER.

I did not think that operating these wagons up and down the streets of San Francisco would have a deteriorating effect upon some of our young men who are required to serve the colors; I left that to be handled by those who were in the best position to know. (Tr. p. 105, fol. 170.)

I have no idea how many are of draft age, and am not interested in any person of draft age, and have no relatives I am interested in keeping out of the war. *I did not see any of the wagons* calling the people to join the American Patriots traveling on the street. I saw one in a stable and all I saw on it was American Patriots. (Tr. p. 106, fol. 171.) I believe and my personal opinion is that under the previous circumstances the conscription law was invalid; I believe there is good warrant for any court in this country declaring it unconstitutional. I never knew or heard ofany conscription law that was ever passed to send troops outside of the country. (Tr. p. 107.) If it was necessary to secure our liberties to send a couple of fellows across the ocean it would be all right, but in my opinion it is not necessary to do it. (Tr. p. 108, fol. 174.)

Carl J. F. Wacker, defendant, testified Sept. 24, 1917 (Tr. p. 29, fol. 49) as follows:

I live at 99 Bay View district, San Francisco, Cal. On August 6, Mr. O'Connell sent me over to headquarters of the American Patriots where I saw Dr. Hoffman for the first time. Mr. O'Connell said the headquarters of the American Patriots were in the Mechanics Bank Building and not in his office, and that I should go over there if I wanted to become a member of the organization and I went over there and joined the Organization. I never had anything to

do with any of the defendants except as a member of the American Patriots. I never talked with any of them about the enlistment law or enlistment in the United States Army at any time. The draft act I discussed with members of the American Patriots only in a general way, I never knew that Herman B. Smith or David J. Smith were at any time members of the American Patriots. I was Secretary of the American Patriots and they were not members. I never heard Mr. O'Connell say at any of the meetings what the objects and purposes of the organization were. I signed one of the O'Connell exemption claims and presented it to the board. After I became a member of the American Patriots I went down to Mr. O'Connell for advice in regard to the examination and signing of papers. I heard that a paper had to be signed *containing an oath putting the person in the military service. I did not intend to sign any paper binding me in any way and so I want to find out about it. I was told that it would be perfectly proper to sign the paper that they presented to me. Mr. O'Connell so told me and he also told me that it was perfectly proper to take the physical examination. This was on August 7th.* That evening I presented the O'Connell exemption claim to the board, and told the clerk that that was my exemption claim and that I would be down the next morning at the time stated in the notice to appear. The next morning at 9:00 o'clock I went down for examination. While I was waiting for the examination the clerk of the board came to me and asked me if my name was Wacker and I said yes. *This was on August 8th.* Then he wanted to know why I had filed it. I said "THAT IS MY EXEMPTION CLAIM." He said "I don't think that is your exemption claim; haven't you any other?" I said I have a number of conscientious objections which the government does not recognize, this is the only exemption form which I can present that covers my case. He said to me, "I

think you have been misled, young man, and as far as I know you always have borne a good reputation in this district, and your father is employed by me, and I think it is best for you to withdraw this exemption claim." I said, "No I have a right to file an exemption claim, and that exemption form claim." He said, "Well, you don't realize what you are doing." I says "Yes I realize what I am doing." He says "If you don't withdraw this form I will have to put you under arrest." I told him if that was the case he should go ahead and do it. I was turned over to the officer in charge of the Station and told I was under arrest, and that he, the clerk of the board, would be responsible for my keeping. At that time I requested that I be permitted to take my physical examination, which was allowed; I was taken up stairs and examined, after the examination was over—I think it was the chairman of the board came over and asked me if I would withdraw it and I refused a second time. He said "Well you didn't pass physically, and it would save a lot of trouble to withdraw it." I said, "I haven't got any guarantee whether I passed physical or not, I must take your word for it." I said, "Furthermore, I would not withdraw an exemption claim, *I have a right to file an exemption claim." Then the clerk came over and they tried to talk me out of it but I would not do it. So they went down stairs and they tried to get the officer to release me, thinking that I would withdraw the claim, the officers refused, and I was taken to the City prison and without communication with anyone. The next day I was taken by the United States Marshal up before the Commissioner; the bonds were fixed that day; I was not able to get the bail, to get out and I had to stay over night in jail. That is all so far. My* folks obtained bail for me in the sum of $10,000. *IT WAS FIRST* $1,000 *AND AT PRESENT IT IS* $10,000 and I have been out of jail ever since. *WHEN I CAME TO MR. O'CONNELL I HAD MADE UP MY*

MIND TO TEST THE LAW. I HAD MADE UP MY MIND TO THAT EFFECT BEFORE I WENT TO SEE MR. O'CONNELL. I HAD BEEN THINKING OF IT EVER SINCE THE REGISTRATION LAW HAD GONE INTO EFFECT, JUNE 5, 1917. ANYTHING THAT MR. O'CONNELL OR ANY OF THE OTHER DEFENDANTS SAID OR DID HAD NOTHING TO DO WITH MY MAKING UP MY MIND. I made it up myself without regard to anybody else. I never had a conversation with anybody on the subject of obstructing the draft act. I never heard a conversation on that subject among the defendants or with anybody else. I never requested any other person to refuse to register or refuse to be physically examined, or refused to obey any of the requirements of the draft act, or of the enlistment act. I haven't any idea of how many of the members of the American Patriots are under 32 years of age because I don't know them all, but of those I do know I think it is about 50 per cent.

My father and mother are living. My father is employed by the clerk of the board, Mr. Reddy. The advice to me by the members of the board was in a friendly spirit but I did not know them. My father is employed by the corporation that Mr. Reddy represents. I knew who he was by sight but not to speak to him. After I was arrested and brought before the U. S. Commissioner, Mrs. Adams, the Asst. U. S. Attorney, asked me where I had obtained the O'Connell exemption claim and I refused to answer that question. *She asked me if I did it of my own volition and I said yes.* Mr. O'Connell did not interrupt the conversation. He came in before the questions were asked and those were all the questions asked of me. I saw in the last clause of the exemption claim where it says that notwithstanding all the humbug and lies the country is in no danger and that John Bull and England is over here influencing and directing our American affairs and so

on and so forth. *I knew what it meant and believed it to be true and I did not intend to withdraw any part of it and refused to withdraw the whole of it. I was counseled a number of times and asked in a friendly spirit if I would withdraw that kind of a claim and I refused to do it because that was my exemption claim. I knew what was in the O'Connell exemption claim and when I signed it, but did not pay any attention to any particular language.* It was not for me to decide what benefit the filing of the claim for exemption or what good its language would do. I did not ask any advice on that point. *I filed it of my own accord and no one told me to file it.* I did not consider that it would do me good or would do me any harm. *I didn't see anything wrong in any statement in the exemption claim.* I saw the notice of the meeting of July 3rd, which is contained in United States Exhibit No. 3. I had attended other meetings of that kind prior to that but did not keep track of them. That was the first meeting that I went to where *the draft law was discussed.* I had never heard Mr. O'Connell or Mr., Miss or Rev. Whitaker or John D. Works speak before that time. I had never been to any of Mrs. Skeffington's meetings. July 3rd. Herman B. Smith made several short speeches and I don't remember what he said. He said something about money being collected to help the boys who wanted to test the Constitutionality of the law. He said substantially what was testified to by the stenographer as a witness in this case. I didn't form any opinion about what he said. My sentiments are not the same as I do not agree to everything that everybody else says. I did not form any opinion about it. *My idea was that there was some sort of movement, to repeal the law, that is the way it sounded to me;* they always take up a collection at the meetings and I thought it was proper. I did not know what they were going to do with the money. I had not made up my mind on that night of

July 3rd. to refuse to go to war or do anything. But I had made up my mind what I was going to do before I went to Mr. O'Connell's office on August 6th. I had decided to test the constitutionality of the law before I went to Mr. O'Connell's office but I cannot tell how long before that I made up my mind. I had intended to see some attorney. I had no idea of being called to report for military service when I went to Mr. O'Connell's office. How could I make up my mind to answer the call to service when I had not received any call? My present view on the question is that I want to test the constitutionality of it. I have been physically examined twice. The last time I passed as fit. I have been notified to appear for military service. I have not made up my mind what to do. I am supposed to report tomorrow at 1:30. I cannot tell what I am going to do tomorrow. I might have an idea in my mind now and might change my mind. Well, if I intend to test the constitutionality of it I will have to refuse to answer the call. No lawyer told me that. That is my own idea. If I answer the call I will be under military service. It would depend upon the circumstances whether I would go if I were advised that I could test the law after I went as well as before, or as well as by refusing to go. According to the way I understand the law now it is that if a person answers the call they are subject to the military law; if they don't they are subject to civil law. I found that out myself. How could a man be under civil law when he is in the hands of the military authorities? I formed that opinion myself, that if I don't go I will be under the civil law, and not the military law. I don't see how I could be within the jurisdiction of the military arm. I never signed any oath. I didn't sign any oath or do anything that put me in the military service. If it is compulsory service then it is force; then they put me in the army by force. I was born here. I claim to be loyal to

the country in which I am living. I am 25 years old and my business is that of a clerk. None in particular. I was in the mercantile agency business. I am out of employment now. No I don't see how I will have to resist somewhere before I can test the law. No one has advised me as to that. I circulated some of the literature. I have been and am secretary, receiving no pay. I have not been there all day at the headquarters. I saw one legal opinion, just glanced at it, and had not seen it before I had filed my exemption claim. I had to join the American Patriots before I received any legal advice from Mr. O'Connell. He gave me no advice until after I joined; then I went back to his office and talked with him. I have not seen any mailing list since I have been secretary. The names and addresses to which I mailed literature I received from Louis Serbin. I don't know where they are. I have been secretary since August the 13, and have seen no lists since and don't know where any list is. I produced here all the records and correspondence that I had of the corporation. It was before I became secretary that I saw a list of names and addresses. The membership list is our mailing list now. The other list I returned to Louis Serbin who was acting as assistant secretary. I didn't succeed him, I succeeded Mr. Krause. Up to August 13, when I had spare time I helped Louis Serbin. After I became secretary Louis took his orders from Dr. Hoffman and myself. I am just keeping the minute book. I know the purposes of the corporation. One of the purpose is to raise funds to test the constitutionality of the law. I don't know anything about Henry Christman, Adam Metler, Sam Lockemeyer or the other Mettlers. They are now members of the corporation. I don't know what the corporation is going to do for them. I don't know what the corporation will do for me, in my hour that is just now drawing on me. I don't know of any fund voted to defend me in my re-

fusal to answer the call to the service. I don't know how is the treasury at the present time. I didn't engage Daniel O'Connell. I am expecting the corporation's attorney to take my case to the Supreme Court of the United States. I don't know about Westerfeld and the others who are in the same frame of mind as I am in. I don't know anything about whether there is one or more test cases. I don't know what is to become of them so far as the corporation's interests in them is concerned. I don't know what Daniel O'Connell is going to do. I have not heard any discussion as to what those who have contributed their money to this corporation propose to do. I have not inquired either. The money collected has been paid out for these expenses in advertising and sending out applications for membership, and things of that kind I think that is up to the legal advisor of the corporation what protection or what this club is going to do for me if I finally make up my mind when the hour of my response to the Government's call comes, that I am not going to obey it; Mr. O'Connell is the legal advisor of the corporation; he is the attorney for the American Patriots, I am Member. If tomorrow I make up my mind to refuse to report, what protection I am going to have through this corporation or association, I suppose the association will take up the matter with Mr. O'Connell; I suppose the Association will do the same with every member who refuses. If we had 5000 members of draft age and they were all summoned to answer the call to service as I have been notified to do. I don't know whether there will be one or five thousand cases. I am not a lawyer. I have not said anything about obstructing the operation of the draft act. I don't think that it would be an obstruction if everybody thought as I did. The defendants Smith are not members because their names do not appear on the books. Their names appear as incorporators. I have never seen their resignations; that was long

before my time. As far as I know there is nothing in the record showing that the Smiths had resigned. Their names do not appear on the membership list. I do not think that I could give a complete list of the present directors. There are nine directors.

RE-DIRECT EXAMINATION.

I don't know by whom the meeting of July 3rd. was conducted. I do not think David Smith took any part in the July 5th. meeting. I saw him in the lobby and said good evening to him. I didn't discuss any question with him. This prosecution has prevented a number of people from joining the American Patriots. They were afraid they would lose their jobs. They had jobs with private concerns. Several had requested not to be summoned here as witnesses, as they were afraid they would lose their jobs.

Dr. E. R. Hoffman, one of the defendants, testified September 21, 24, 1917 (Tr. pp. 28, 29,) as follows:

I am a regular physician and surgeon duly licensed to practice in the state of California. I was born in California and have resided in San Francisco most of my life. On June 5, 1917, I was a member of the District Board of San Mateo under the draft act of May 18, 1917, and registered a great many people. The first time I saw any of the defendants was on July 21, 1917, when I saw Mr. O'Connell at the meeting of the American Patriots in the Assembly Hall of the Pacific Bldg. I never had any communication with him in any way prior to that except that during the day of July 21, 1917, I called him on the telephone and asked him when there would be a meeting of the American Patriots, and he told me that night at eight o'clock and I went down to the meeting. Somebody asked for a statement of the purposes of the corporation and Mr. O'Connell made the statement. He said substantially what is in the circular letter which I saw on the morning of July 21st and which is the prosecution's Ex-

hibit No. 11. The picture heading was not on at the time. I saw none of the other defendants that night. I never saw Herman Smith until some time after I had become a member of the American Patriots. I think it was just before Mr. O'Connell was arrested. It was after we opened headquarters in the Mechanics Bldg. I saw David J. Smith a few days before I saw Herman. I saw the defendant, Carey, early in August. I cannot remember the date. My first recollection of seeing Mr. Wacker is after he had been arrested. I cannot tell when or with whom of the defendants I had a conversation on the subject of enlistment in the service. I have had so many conversations regarding the enlistment that it is hard to segregate any particular conversation on that subject. I had a conversation on the subject of the draft act. I have handed out quite a number of circulars to various people such as Exhibit 11. *I handed one to every one who came into the head-quarters inquiring about the organization. I handed them a circular, told them to read it, that that explained the purpose of the organization much better than I could express it. I told them after they read it that if that was their view point they were welcome to become members of the American Patriots. If they did not coincide with those views we did not care for them as members. I told them that practically in every instance. I did not send any circulars by mail. I gave them to my friends and some to strangers. I have often expressed that in my opinion that the Draft act is unconstitutional.* Regarding enlistment that if anybody voluntarily wanted to enlist that was absolutely up to them. In fact, if anybody believed that this war is right and that the Government is right in passing this draft act, *they should enlist, and if I believed that this act was constitutional I would enlist immediately. That is my opinion and the way I expressed it. I never expressed it in any other way.* I never had a conversation with

any of the defendants on the subject of obstructing or resisting the draft act, at any time. *I never communicated any ideas on obstructing or resisting the draft act to the defendants or anybody else. I never suggested any ideas about resisting or obstructing the draft act to anybody at any time. I never said anything about resisting or obstructing the draft act any time. I never advised anybody not to register. I never advised anybody not to do anything required by the draft act.* On the night I joined, July 21, I became treasurer of the organization. I requested Mr. Gray as a friend to open the books for me as treasurer. Mr. Gray at various times spoke to me on the subject of the American Patriots. *I never requested him to join.* I have seen probably 75% of those who joined the American Patriots, off hand I should judge *probably* 10% *were within the draft age.* I didn't know how many filed the so-called O'Connell exemption claim. *I know of only two members who have been called to the colors. Those are Mr. Wacker and Mr. Donlon.* On the night of July 21, I made a motion that the entrance fee be $5 and the dues $1. Prior to that time they were 25c a month, and they could not get finances enough to cover the expenses. That is why the meeting adopted my motion. Miss Mallory was secretary at that meeting. MR. O'CONNELL TOLD THOSE WITHIN THE DRAFT AGE TO FOLLOW EACH STEP OF THE LAW AND IF ANYTHING CAME UP THAT THEY DID NOT UNDERSTAND IT WAS TO BE REFERRED TO HIM. THAT THEY WERE TO SUBMIT TO THE PHYSICAL EXAMINATION AND TO SIGN THE PAPER REQUIRED BY THE PHYSICIAN, A STATEMENT OF THEIR PHYSICAL EXAMINATION, *but not to sign any paper that would put them into the military service or to take the oath lest they would* LOSE THEIR CIVIL RIGHTS. At various times I have heard Mr. O'Connell say that if they took the oath

they would be subject to court martial if they attempted to resist in any way; that they would be no longer within the jurisdiction of the civil courts by taking the oath as a member of the military. There were none who became members who ever came to headquarters, or Mr. O'Connell's office, so far as I know, who did not say that THEY WERE DETERMINED TO TEST THE CONSTITUTIONALITY OF THE DRAFT ACT, *and no person ever became a member through me that did not first look over the circular and indorse it. They always signed the circular by signing the blank application at the bottom of them.* It is Exhibit 11. EVERY PERSON WHO BECAME A MEMBER STATED BEFORE THEY BECAME MEMBERS THAT THEY WERE DETERMINED TO TEST THE CONSTITUTIONALITY OF THE DRAFT ACT. The books show everything that was paid out. They have been delivered to the court and have never been returned to me. *All the books and all the papers have been delivered to the court under subpeona from the District Attorney.* Everything is shown on the books. Somewhere in the neighborhood of four to six hundred dollars was collected. Somewheres around $37 was the balance when I turned over the books to the court. There was a controversy about the funds collected at Lodi. I could not state exactly but what Mr. Gray mentions was settled up and finished by Mr. O'Connell giving me somewhere in the neighborhood of $10. and the receipts for the printing bill and other bills that had been paid, and also for the filing of suits. MR. O'CONNELL NEVER RECEIVED ONE CENT FOR ANY SERVICE THAT HE HAS EVER DONE FOR THE AMERICAN PATRIOTS WHILE I HAVE BEEN TREASURER, AND THERE WAS NOTHING RECEIVED BY HIM BEFORE TO MY KNOWLEDGE. THERE WAS NO MONEY IN THE TREASURY WHEN I BECAME TREASUR-

ER EXCEPT THE COLLECTIONS OF THAT FIRST MEETING. IT WENT TOWARD PAYING OF THE EXPENSES. THE PICTURE AT THE TOP OF EXHIBIT 11 WAS A CUT MADE FROM PICTURES ON THE WALLS OF DANIEL O'CONNELL'S OFFICE.

The circular letter was always given to everybody who came in the office to read. To my mind it was the quickest way to clear the matter up to read that circular letter. THEY HAD TO ENDORSE THAT CIRCULAR LETTER AND SIGN THE BOTTOM OF IT BEFORE I WOULD ACCEPT THEM AS A MEMBER. I knew an individual could not test the law on $5 and $1 a month. *I mean when I say they were* DETERMINED TO TEST THE LAW, THAT A POOR INDIVIDUAL ALONE COULD NOT FINANCE THE LEGAL BATTLE NECESSARY TO TEST THAT ALL THROUGH THE COURTS. I cannot recollect the language used by each one that led me to believe that he intended to test the law. I did not concern myself with the legal status of the question at all. I knew how it was to be accomplished, was to be handled by a lawyer, but it did not concern myself as to the process or methods. I did not inquire into their reasons for joining the corporation at all except that they endorsed the circular there and I think they believed the same as I did. They did not discuss with me the question of whether they wanted to go to war or did not want to go to war. They did not talk about what process they were going to use in their determination to test the law, and I did not have any idea of how it was going to be done. Nobody told me how it was to be done any more than I have said here before regarding the circular and what Mr. O'Connell said at the meetings. One test case would be enough to test the law. I don't know what was to become of the other drafted men while that was going on. I had an opinion on it.

My opinion was that they would have the same privilege as anyone else. If one man went out to test that law individually, he has that right, as I understand it from what this court says and the United States Attorney. Now if 5000 men individually go out to test that law, they each have the same individual right, and we could not accuse one of these men of obstructing the law because 5000 men did the same as he did. In all the thinking I have done on that matter it always occurred to me that if we got 5000 members who were within the draft age *it would not be up to us, it would be up to the courts to facilitate the matter and decide the constitutionality of the law.* THE OBSTRUCTION DOES NOT COME FROM US, it comes from the courts. I DID NOT CONSIDER FOR A MINUTE THAT THE PEOPLE WHO JOINED THE AMERICAN PATRIOTS, OR WE, WERE OBSTRUCTING ANY LAW. I did not consider that any member if he wanted to, would have the privilege of refusing to report for service if notified. If we succeeded, or if the law was proven unconstitutional, we did not expect any of them to go across the water *prior to the question being determined.* THAT IS NOT THE SAME AS RESISTING THE LAW. If their services were required by the government across the water I expected them to do as they pleased. I could not govern their actions. THE PURPOSES OF THE CORPORATION ARE STATED EXPLICITLY UPON THE CIRCULAR. THAT IS WHAT I SUBSCRIBED TO. THAT IS WHAT I GOT EVERYBODY ELSE TO SUBSCRIBE TO WHO JOINED THROUGH ME. Now if the District Attorney is trying to get me to say that there was *any ulterior motive, absolutely no.* THE PURPOSES OF THIS CORPORATION WERE TO TEST THE CONSTITUTIONALITY OF THE DRAFT ACT AND OTHER THINGS MENTIONED IN THE CIRCULAR. I DON'T THINK I AM OB-

STRUCTING THE DRAFT ACT ALREADY. Henry Mettler, Mike Donlon, and Wacker, are members and Henry Mettler, who has refused to answer the call to the colors, *has the right to test the law if he wishes.* It don't need any more than one to test the law. An attorney does not need any more than one but just as I contended a while ago *they all have the* RIGHT *to test the law.* I THINK THIS COURT SAID A FEW MINUTES AGO YOU COULD TAKE UP A COLLECTION TO PROTECT ANY INDIVIDUAL. IF A MAN IS OF THE FIRM CONVICTION THAT HE IS NOT GOING TO DO A CERTAIN THING BY JOINING AN ORGANIZATION OF WHICH I AM A MEMBER CAN IT BE CONSTRUED THAT I AM INDUCING HIM TO DO ANYTHING? I did not help to run the Johnny Bull wagon up and down the street. I was a member of the corporation when it was done and I paid the bill as treasurer. I did not endorse the movement of the Johnny Bull wagon. I did not consider the effect on young men at all. *The John Bull wagon would not have any effect upon the mind of a man drafted for service if he thought it was right to be drafted.* I have not analyzed it at the present time and don't know whether that wagon would cause a young man who was not up on these matters to question in his own mind the wisdom and policy of his country. I wanted the reader of the sign "John Bull and his agents are ruling and ruining us; what are you going to do about it"? to figure out in his own mind, if he could, just where he was at, when he read the signs on that wagon. *My idea was then to join the American Patriots. My reply to your question what good would joining the American Patriots do to help run Johnny Bull out of the country, from conversations I would have with everybody I would meet that was usually the topic of conversation. Many times a man would say "I don't believe in this war" and immediately he would turn around to see if there was a*

cop back of him. I thought we would have, and my firm conviction was, that the American Patriots would number about 100,000 in San Francisco. My idea is this, that the majority of the people in the United States are not in favor of this war. Now that is my *opinion.* It used to be and it is now. 100,000 in San Francisco would mean many millions in the United States, and if many millions joined a movement of that kind *Congress would certainly reconsider. I mean that Congress at its next session would repeal the act, the conscription act.* I thought probably the administration would obstruct and interfere with the draft act; that it would bring about such a result *by the administration, the national administration. This court said that the people are the rulers. I am certainly over the draft age. I had no interest in going into this thing on account of the draft because I am older than the United States Attorney.* If we had 10,000 members of the draft age in San Francisco, that would mean, speaking proportionately, many millions *would cause Congress and the administration to act upon the will of the people which is the law of the land.* It would in effect do away with this draft act *because I believe that the law is unconstitutional.* If they repealed it there would be no necessity about testing its constitutionality or unconstitutionality. No man in the United States is expected to do military service if he doesn't want to. Whether any member of our organization would submit himself to military jurisdiction depends on whether the law becomes constitutional or not. *I don't know what would happen to any member pending the decision. I don't even expect to think.* That legal question was up to the counsel. I remember Mr. Mowry testifying. I did not put those exemption blanks before him. I told him here are some of our circular letters, what do you think of them? Read them over." He was within the draft age. I knew it at the time. I handed the circular to

others in Colma who were within the draft age. We have three members from Colma. One is within the draft age. I don't know whether the 23 on the list from Lodi are within the draft age. The McCulloughs are not members. One of them used to be a member but resigned. I don't know who of the members are within the draft age and who are not. I am not giving all my time to this movement, nor was I at the time I was arrested. I am a practicing physician. At the time I first joined for a couple of weeks I did give practically all my time trying to get the books in good shape. *I expect nothing out of it.* I WAS DOING IT FOR LOVE OF MY COUNTRY WITHOUT EXPECTATION OF ANY FEE. I DO NOT ENTERTAIN ANY POLITICAL VIEW THAT LED ME TO TAKE THIS KIND OF ACTION. I was opposed to the entry of the United States into the war. Prior to the entry of the United States into the war I had expressed myself on the merits of the case between *the other belligerents.* It was favorable to Germany. I am of German descent. I recognize we live in a representative form of government. It is supposed that the majority rule. There was a majority in Congress in favor of entrance into the war. I think that the majority of them voted for it, *voted against the stipulated promises to their constituencies.* I did not help send out any messages against America entering the war or anything upon the subject. I cannot prove corruption in the Congress in the interests of the war. I would not charge the President with being corrupt. I could not prove that either. I have not bothered my head about the cabinet. I would not say that the present administration is in the hands of corrupt men. They might be misled. I CERTAINLY THINK THEY ARE UNPATRIOTIC. Their views do not coincide with mine. THEY ARE ABSOLUTELY DISLOYAL TO THE AMERICAN CONSTITUTION BECAUSE OF THE DRAFT

ACT. I do not know the principles of international law involved in this war and have not made any study of that question. I have not made any study of the freedom of the seas; as a lawyer, no, in other ways I have. I don't know where the mailing list of this corporation is. I have seen it in the custody of young Serbin last. I don't know how or where or who furnished the names or the list. I made no inquiry of any of the defendants because I had no object. I think it was a little hand-writing and a little typewriting. I never had anything to do with sending the literature out but I knew it was sent out. I don't know where. We did not organize the American Patriots in any other States and did not attempt to. We thought the American Patriots might result in a political organization. I was not a candidate for any job. I did not show this legal opinion to members or to anybody outside of those who were just in the office with me. It was in the office.

I heard the testimony of Miss Barkley. She never prepared any petitions for me or for the American Patriots. I never had any conversation with the witness Mowry regarding our methods because I did not know what our methods would be. That was in the hands of the attorney. *But in discussions on the subject it was brought up regarding the taking of troops out of the United States and I made the statement that nothing but regular volunteer troops could be legally taken out of the country and that a man could even refuse to embark at the time of embarking. I got that idea from the fact that nothing but volunteer troops can be taken out of the United States. I have always understood that. It was not suggested to me by Mr. O'Connell. I have had that idea in my head ever since I went to school. I have read through the address of Hannis Taylor to the Congress of the United States and the opinion of the Attorney General Wickersham given in 1912.* I was a German sympa-

thizer before the United States entered the war *because I have a feeling for what I consider the underdog; it looked to me like a gang fight.* I did not object to anyone else sympathizing with any of the belligerents, yet *I thought this country should remain absolutely neutral,* and I always argued that the United States should not have trafficked in war munitions; it was brought out time and again to place an embargo on the traffic of war munitions and the administration said at that time that that could not be done, that it was out of the question. After the war was declared there was an embargo on foodstuff going to neutral countries and I could not reconcile the two different attitudes of the administration. We had no quarrel. *I was neutral before the war and before the United States entered the war. I didn't take any part on either side in any public meeting or any public societies of any kind advocating either side. I knew when I joined the American Patriots that there were bills before Congress for the repeal of the conscription law.* SEVERAL MEMBERS OF THE AMERICAN PATRIOTS HAVE RESPONDED TO THE CALL OF THE COLORS. They did not consult with me before they went. I don't know whether they consulted with Mr. O'Connell. The legal work of the American Patriots was left to the Attorney. *The objects of the corporation I could not possibly express more clearly than they are expressed in the circular letter and that is what I subscribed to. The American Patriots was not expected and could not finance more than the two test cases of M. Donlon or the Mettler case, which ever came first.*

I don't know that there is anything in the draft act itself on the question where the troops shall be used. There may not be in the draft act itself. My understanding is that the draft act is *unconstitutional because it calls for service outside of the territorial boundaries of the United States, and the newspapers*

have led us to believe that. I cannot say that there is any word in the draft act about where the troops shall be used. I did not tell Mowry that an injunction proceeding would be served at the time of the attempted embarkation. I didn't use the word injunction. I said nothing more than they had a right to refuse to go then. At that time there was nothing said regarding the members of the American Patriots. In the general conversation it was brought up that a man could refuse to embark, unless he was a member of the regular volunteer army. I have denounced the declaration of war. I never saw any motive in entering the war. I condemned the Lusitania incident and did not condone it. I have not upheld any German intrigue or alleged crimes in our own country here. I have not upheld the diplomatic letters to divide our country between Mexico and Japan. I believe in the freedom of the seas. I did not endorse the sinking of the hospital ships or Belgium relief ships or submarining or torpedoing merchant vessels without warning or without search or without a chance for the noncombatants to get a point of safety. In controversies over the subject I have said that it makes no difference which power, you can practically leave out the names of the belligerents and take it hypothetically, that if a power uses a flag to another power to mask its own ships and after a submarine or smaller vessel asks that vessel to heave to and they get alongside, then if the larger vessel attacks the smaller one, then I think the other power has a right to announce its intention of sinking without notice. *I think the United States would have the same right. I do not believe that it was the right of any belligerent to attack an American vessell, and without a word of warning torpedo and sink the vessel, the cargo, the crew and the passengers without any chance whatever to escape. I believe in our form of government as it is intended not as it is practiced today.* I don't think we ought to have a revolution

here and I never said so. But I have said that if organizations such as the American Patriots were *not* allowed to take proper legal steps there would be apt to be a revolution. I meant by that if the people could not have their legal rights respected that the administration and those back of it would shove themselves into a war, although I would not take part in one myself. If the American Patriots allows its members to each one go out and refuse to answer the call to military service, and be punished only for misdemeanor, I don't think that it would be cause for a revolution here. My position is not that the object of the American Patriots is to have any of its members if they so desire to refuse to enter military service and to resist the law and if it is upheld that they be punished for a misdemeanor only ond thereby discharge themselves from any further obligation; and if it is declared void that the whole war, and our system of raising an army stop. That is not my position. MY POSITION IS THAT IF I WERE OF DRAFT AGE AND THE SUPREME COURT OF THE UNITED STATES DECLARED THAT LAW CONSTITUTIONAL I WOULD GO; AND I TEACH MEMBERS JUST EXACTLY THAT. I don't know what the legal opinion says. The theory upon which the corporation was proceeding was *not that all that can be done with a man for refusal to conscript, is that it is simply a misdemeanor and that after he serves his term, if he has to serve it, that ends it all under the act.* I understand the legal opinion to mean that if a man refused to be conscripted under the selective Service Draft Act he committed nothing but a misdemeanor if the law was valid, and that after having served the sentence imposed his liability to military service then and there ends under the law. I did have a copy of the opinion on hand in the office not under the seal. *I did not show it to anybody. Nobody showed it to my knowledge. It was there as a matter of information*

for myself. There was no particular use I could make of it. The legal opinion does not express the objects of the organization. I made no use of the opinion. I did not have it there for any purpose at all. I did not bring it into the office. I think it was brought there by young Serbin who acted as our clerk and when he put the seal on it I asked him why he did that. It was the mere playful act of a child. Mr. O'Connell prepared the opinion in answer to the questions. *The legal opinion does not state the initial purpose of the corporation.* Those questions were asked him by a party and they were replied to. I haven't any opinion on the correctness of the law stated in that opinion. I know how Congress voted for the declaration of war but I had a well defined belief that the repeal of that act by the present Congress could be done very easily if there was a strong enough public opinion against it. *I believed that all the people who opposed that law, if they all voiced their sentiments to Congress, they would repeal the law. My faith was not particularly pinned on the next Congress instead of the present one. My idea is that members of Congress and everyone else keep their ears pretty close to the ground. I also basd my opinion that it was unconstitutional for troops to go out of the United States on the information that the Supreme Court of the United States declared that no troops could be sent abroad on conscription.* I think it was on the conscript act of 1863. I learned about it in history in school. It can be found in the records of the Supreme Court, I think. I have not tried to find the volume or page or chapter or verse or date. *In addition to the opinion of Attorney General Wickersham that the state militia could not be sent out of the country, there is a decision of the Supreme Court. I cannot see where a government or a Congress has the right to pass a law against the constitution. I believe a man's denunciation of a law should be restricted to a reasonable and sensible and*

ordinary method of contesting the law, and I believe that it is just as legitimate for a man to parade these streets with banners saying that John Bull is ruling and ruining this country; or did Washington fight in vain? Join the American Patriots, and using 15 motion picture theatres and using 10,000 circulars, more or less, of the kind that appear in evidence and also this opinion; and also putting that clause in the exemption claim referred to and believe they are perfectly legitimate and just as legitimate as discharging men for refusing to buy liberty bonds, for putting posters all over the United States declaring you are needed for your country's service, or subsidizing newspapers. *I think that the methods are legitimate.* I believe that a legitimate way to test the law would be to have one case expeditiously started and expeditiously advanced for a hurried opinion AND THAT THE COURTS SHOULD DO THAT, but we cannot move faster than the Courts will allow us, AND WE HAVE HAD NO CHANCE TO MY KNOWLEDGE TO DO SO UP TO THE PRESENT TIME. Attorney General Wickersham stated that his opinion was rendered prior to the act of June 3, 1916, and that since the passage of that act his opinion was no longer binding. I knew that when he said that, it did not make any difference because an act of Congress could not change the Constitution of the United States. The various things asked me about what Germany did on the sea and so on is still disputed by Germany. It is a disputed fact whether she did or did not do these things. Germany says she is not guilty of these things about which I have been asked. (Tr. pp. 131-140.) I remember some of the debates in Congress prior to the vote. *I do not know of any other way of raising the money to test this act than by the use of the teams and moving pictures and the sending out of the circulars. THE PURPOSE OF sending out the wagons and having the moving picture slides was to bring the people who be-*

lieved as we did into the organization; that was my idea. THERE WAS NO OTHER PURPOSE INVOLVED. I did not expect to bring in anybody that believed differently. I did not think that that would change their mind. I DID NOT CONSIDER THE STATEMENTS ON THE WAGON, AND ON THE SCREENS IN THE MOVING PICTURES TRUE. I AM STILL OF THAT OPINION. The American Patriots has not any means of securing funds with which to test the validity of this act and carry out its purpose except in this way. I HAVE NO MEANS NOW TO TEST THE VALIDITY OF THESE ACTS. IF IT RELIES ON THE PRESENT CONDITION OF THE AMERICAN PATRIOTS THE VALIDITY OF THE ACT CANNOT BE TESTED. In my *opinion* any man who has one single *ounce* of *real patriotism* would do anything in his power to prevent and stop this war. (Tr. p. 141, fol. 226.)

Miss L. D. Harding testified that she was a stenographer and typist working in the City Hall and on the evening of August 21, 1917, she attended a meeting at Dreamland Rink and took down some of the speeches including the speech of Daniel O'Connell, on "True American Patriotism"; that she took it all and afterwards prepared a correct transcript of her minutes, which transcript she produced; that she did not report the speech for Mr. O'Connell, and he did not ask her, and he did not have anything to do with her reporting it. At this point *defendants offered the transcript in evidence TO WHICH THE PROSECUTION OBJECTED,* but it was duly admitted and marked defendant exhibit No. C. (Tr. p. 142.)

Wal J. Tuska testified for the defense Sept. 25, 1917, as follows: I am an attorney at law *practicing in California for 35 years, and have had practice in the Supreme Court of the United States,* as well as all the Courts of California. I remember *about two months*

ago talking with the defendant, Daniel O'Connell, about the constitutionality of the draft act.

At this point the following questions were asked by the defendants, objections sustained, and exceptions saved:

"Will you tell the court and jury as quickly as you can what the conversation was.

"Did you talk with Mr. O'Connell about *taking proceedings to test the constitutionality of the draft act?*

"Did you have any talk with Mr. O'Connell about you being retained to assist Mr. O'Connell, as senior counsel or otherwise, in preparing a test case for the Supreme Court of the United States on the constitutionality of this draft act?

"Did you ever talk with Mr. O'Connell about the expenses of taking the case to the Supreme Court of the United States and how the money to meet the expense was to be raised?

"Did Mr. O'Connell have any talk with you about organizing a corporation for the purpose of raising the money to meet the expenses of carrying the test case to the Supreme Court of the United States?"

Mr. Preston: To which we make the objection that it is immaterial, irrelevant and incompetent, a self-serving declaration, not germane to any issue in this case in any shape or manner.

The Court: I do not think, UPON THE THEORY UPON WHICH THE CASE HAS BEEN TRIED that is strictly so. THEIR CLAIM IS THAT THIS CORPORATION WAS ORGANIZED WITH THE HONEST AND INNOCENT PURPOSE THAT THEY STATED, TO SECURE FUNDS FOR THE TESTING OUT OF THIS LAW AND HER PURPOSES.

Mr. Preston: You can answer that, Mr. Tuska.

Mr. Tuska: I understand the question, about two months ago I did have such a talk with Mr. O'Connell

Q. Tell the jury what it was.

Mr. Preston: Objected *as immaterial.*

The Court: The objection is sustained.

Q. Tell the jury what Mr. O'Connell said on that subject.

Q. Did Mr. O'Connell tell you that he was organizing a corporation for the purpose of raising funds to pay you a retainer for preparing and presenting this case testing the constitutionality of the draft act?

Q. Did you afterwards inquire from Mr. O'Connell how far he had got with the corporation in raising the money to pay the expenses of testing the constitutionality of the draft act in the Supreme Court of the United States?

Mr. Preston: I object to that.

The Court: The objection is sustained, Mr. O'Connell, and *I will now instruct you not to ask anything further along that line.*

The witness was then excused.

DOCUMENTARY EVIDENCE OFFERED, EXCLUDED, AND EXCEPTIONS.

For the purpose of showing good faith, good intentions, a purpose only to maintain the Constitution of the United States, and on what the defendants and the witnesses rested their firm belief in the unconstitutionality of the draft act and violation of that constitution, and sufficient grounds for that belief, they offered in evidence some of the documents, speeches, opinions, and arguments on which they testified they read and in part based that belief as follows:

1. The decision and charge of Judge Rose of the United States District Court of Maryland, contained in the *Congressional Record.*

2. The opinion of Attorney General Wickersham on the constitutionality of sending the military out of the country.

3. The Pope's appeal to the President of the Unit-

ed States and the United States Government's reply to the Pope's appeal to make peace.

4. The debates in Congress showing the claim and arguments that this draft act was unconstitutional.

To this offer the District Court said:

The Court: *In the first place the opinions of others are no justification for an act that is claimed to be illegal;* in the next place so far as their bearing is concerned, these remarks *have no bearing upon the question that we are dealing with. They are wholly incompetent for the consideration of this jury.* (Tr. p. 170, fol. 268.)

5. The argument of Daniel Webster in Congress December 9, 1814, on the constitutionality of conscription for foreign service.

To which offer the court said:

The Court: The objection that it is *incompetent and irrelevant* is sustained.

6. The two documents identified and marked during the testimony of the government's witness, Joseph A. Lame (Tr. pp. 79, 80, 81) as having been bought and read by, and quoted from by him, one being the opinion of Attorney General Wickersham and the other the address of Hannis Taylor to Congress on the unconstitutionality of the draft act.

To which offer the Court said:

The Court: I just ruled out the Wickersham opinion.

Mr. O'Connell. That was in the Congressional Record. I thought possibly your Honor had sustained that objection on the ground of authenticity.

The Court: *No. It is wholly immaterial.*

Mr. O'Connell: I offer these papers as identified.

The Court: They will be excluded.

7. The speech of the President of the United States to Congress dated January 22, 1917, called the "Peace Without Victory" speech.

Mr. Preston: It is not necessary to offer that. We object to it as being incompetent, immaterial and irrelevant.

The Court: The objection is sustained. (Tr. p. 171.)

The foregoing was all the evidence offered or introduced by either party now relevant or material for the consideration of all the questions raised on this appeal.

ASSIGNMENT OF ERRORS.

I.

That the trial court erred in overruling the demurrer to the indictment and each count thereof, in this, to-wit:

1. The first count of said indictment is repugnant to itself in that it alleges a conspiracy to obstruct recruiting and enlistment by inducing and persuading and not by threats, force, or violence, and Congress never intended that said crime should be committed by inducing or persuading or applied to members of a family who should induce and persuade other members of the family not to enlist or be recruited, but intended that the words obstruct or obstructing should mean and apply only to cases where the obstruction was by threats, force or violence, or resistance.

2. The second count of said indictment is based on Section 6 of the Selective Service Act or Draft Act approved May 18, 1917, which section applies only to persons who as officials or otherwise were employed or engaged in carrying out, or executing the provisions of the said Draft Act, and not to strangers who might or might not be subject to be called, and there are no allegations in the said indictment that any of the defendants were officials or otherwise engaged in carrying out or executing the provisions of said Draft Act.

3. "Inducing and persuading" can only be accomplished by way of speech, or writing, or peaceable as-

sembly, and to make either or all of them a crime would be abridging the freedom of speech, freedom of the press, and the right to peaceably assemble, discuss, criticize and pray for redress of grievances and thus accomplish that indirectly which the Constitution of the United States in its first amendment prohibits Congress doing directly.

4. The State of California has full power to legislate upon the subject of free speech, freedom of the press and peaceable assembly and in its Constitution provides that "every citizen may freely speak, write and publish his sentiments on all subjects" and that "the people shall have the right to freely assemble together to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances," and therefore any construction of said act to cover or include the inducing and persuading alleged in the indictment or either count of said indictment, would be without any authority of the law and a violation of the Constitution of the United States and the State of California.

5. The Espionage Act approved June 15, 1917, and the Selective Service or Draft Act approved May 18, 1917, and the rules and regulations approved by the President of the United States in pursuance thereof and approved May 18, 1917, are each and all without authority of law and unconstitutional and violate the Constitution of the United States in the following among other particulars:

6. The trial court erred in refusing to direct a verdict of not guilty at the close of the evidence for the government in this to-wit: because there was no evidence whatever of any of the conspiracies charged in any of the counts of the indictments, or any act done to effect any of said conspirators or in pursuance of any of said conspirators.

7. The trial court erred in refusing to quash the

indictment at the close of the evidence for the government, in this, to-wit: for the same reasons set forth in the previous assignment of error.

8. The trial court erred in refusing to direct a verdict of not guilty at the close of all the evidence, in this, to-wit: there was no evidence whatever, of any of the conspiracies charged in any one of the counts of the indictment and there was no evidence whatever of any act done to effect the object or objects of such conspiracies or in pursuance thereof.

(Tr. pp. 195-198.)

AMENDED ASSIGNMENT OF ERRORS.

I.

The District Court erred in not granting the motion in arrest of judgment, which motion was made, "because of which said errors in the record herein, no lawful judgment can be rendered by the court upon the record in this cause." And the record showed the following indefinite, uncertain, insufficient verdict (Tr. p. 172, f. 270) as follows: "We the jurors find the defendants (naming they all) guilty on the_____ count on the_____count. Thomas H. Haskins foreman," which verdict certainly does not find the defendants guilty on both counts; if on either count. The first count was for a felony, and the second count was for a misdemeanor; and from that verdict the court was unable to find whether the defendants were convicted of a misdemeanor or of a felony.

II.

The District Court erred in making its judgment, and sentence in said action; in that it imposed on the defendant, Daniel O'Connell, a sentence on the first count of five years in the Federal Penitentiary at McNeil's Island, Washington, and on the second count, two years in the same prison, both to run concurrently, and upon the defendant Carl J. F. Wacker, on the first

count a sentence of eighteen months, and eighteen months on the second count of the indictment, at the same prison, terms to run concurrently, and a fine in the sum of $250.00. Said sentences are null and void, because there is no verdict of guilty on both counts; if on either, it is impossible to tell on which count. The second count is under the draft act of May 18, 1917, which specifically fixes the punishment which is not more than one year in jail, and the punishment inflicted, or pretended to be inflicted, was in excess of that which the court could have imposed if there had been a verdict of guilty on the second count. (Tr. p. 192, fol. 303.)

III.

DENIAL OF NEW TRIAL.

The District Court erred, and abused its discretion in denying the motion for new trial, (Tr. p. 192, fol. 303), for the reasons set forth in said motion, (Tr. p. 189, 190, fols. 298, 299), which are all in this assignment of errors all then within the knowledge of said District Court and judge at the time of said denial.

IV.

CHARGE TO THE JURY.

The District Court and District Judge erred in the charge to the jury in making to them the following statements:

"I.

"Now, the theory upon which the Government's case proceeds is, in substance that the defendants have transgressed the principles I have stated and have violated the law by deliberately and intentionally entering into an unlawful combination or association to thwart, interfere with, and obstruct the carrying out and enforcement of the Selective Draft Act by a course of conduct consisting of a series of acts not only intended but calculated to accomplish this unlawful purpose; that the or-

ganization of the corporation called the American Patriots was not had in good faith with any genuine purpose of testing this law, but was intended to be used merely as a means through which to secure funds for the use and benefit of those organizing it and with which to conduct a propaganda against the act, with the intent to hamper and defeat its execution and to use the corporation as a mask or cloak for their operations, under the mistaken idea that thereby the individual members would be shielded from responsibility for their acts; that in pursuance of this purpose the defendants and others inspired by them issued and distributed pamphlets, circulars, advertisements on wagons, legal opinions and other literature, made public speeches and film presentations, and gave private advice to individuals, all of which was of a character to render it unlawful and was designed and intended to inflame the minds of the people, and particularly those subject and eligible for military service, against the propriety and validity of this act and to arouse active opposition thereto and thereby persuade and induce them to refrain from enlisting in the military service or complying with the compulsory requirements of the act, and thereby to obstruct and interfere with its execution and enforcement. If you find this theory of the Government to be sustained by the evidence then it will be your unquestioned duty to find the defendants guilty.

"II.

"As I had occasion to state in your presence in passing upon the motion of the defendants for an instructed verdict, there is evidence before you which is sufficient in its legal tendency, that is sufficient as a matter of law, to sustain the Government's theory; but whether it is such as to satisfy

you of its truth is a question wholly for your consideration and determination, as I shall more particularly instruct you.

"I do not deem it necessary to review the evidence in the case at length, as is my right; you have heard it all and, as I have observed with satisfaction, with a close and attentive ear. I may therefore leave it for your intelligent consideration, feeling full confidence that you will not overlook any of its material features and in your ability and disposition to reach only just conclusions therefrom. I should, however, notice the aspects of some of the facts which the evidence tends to establish, the tendencies of which might not otherwise be readily apprehended by the minds of laymen like yourselves, that is, men not versed in the law.

"III.

"Among other documents which the evidence tends to show were put out and furnished by the defendants through the American Patriots and those in its employ to people who came to its office was a so-called legal opinion admitted to have been prepared by the defendant O'Connell, a copy of which has been put in evidence. It is in the form of questions and answers for the guidance of men seeking advice on the subject of the draft, and in its contents these questions and answers are found:

" '2nd. Will they report to exemption or ex-'aminations boards? Ans. As the boards might 'have them take the oath or sign some papers put-'ting them in the military service, the safest way 'is to not go, but simply file an affidavit of ex-'emption, as the best and safest way of testing 'the law. 3rd. If they refuse to go are they un-'der military law? A. No, they are not. 4th. 'Can the military authorities proceed against

'them? A. No. Also: If the law is declared con-
'stitutional, then the worst that can happen is
'that the defendants will have to serve a year in
'jail.'

"These answers do not state the law. In the rules and regulations promulgated by the President in accordance with the terms of the Selective Service Law is this: 'Each district board shall 'certify in quadruple forms provided by the Pro-'vost Marshal General for that purpose, to the 'adjutant general of the State, Territory, or Dis-'trict of Columbia, as the case may be, the serial 'numbers, names, and detailed addresses of all 'persons called by the local boards within the 'jurisdiction of such district board who have not 'been exempted or discharged; separate certifi-'cates shall be made in respect of the men called 'by each of the several local boards. Upon receipt 'of such addresses shown in the certificates notify 'each man whose name has been so certified that 'he has been selected for military service and shall 'order him to report for military service in person 'at a specified time and place, to be fixed pursuant 'to advices from the Adjutant General of the 'Army. From the time so specified each man to 'whom such notice shall have been so mailed shall 'be in the military service of the United States.'

"This rule the President was duly empowered to make and is a perfectly valid regulation. In accordance with its terms, where a drafted man has been notified as there provided, that he has been selected for service and is ordered to report for duty, he is from that moment in the military service and subject to military law, and for a refusal to obey the order may be proceeded against by the military authorities and forcibly arrested if need be. Nor is it the law that if the act be held constitutional the worst that can happen to the

person arrested for failing to report is a punishment of one year in jail. He may not only be thus punished, but may then be required to give his service in the Army. And it is not the law, as contended at the trial by defendants, that if a man reports for service in obedience to the notice to appear he then loses any right to resort to the civil courts to test the validity of his compulsory service. As I had occasion to say earlier in the trial, if he deems the law under which he is taken to be invalid or unconstitutional he will still have his remedy by habeas corpus to test its validity of his compulsory service. As I had occasion to say earlier in the trial, if he deems the law under which he is taken to be invalid or unconstitutional he will still have his remedy by habeas corpus to test its validity. The Civil courts may in any case inquire into the validity of the process of warrant under which a citizen is detained against his will, whether in the army or elsewhere. The advice given in this opinion was therefore erroneous and misleading as not stating the law. It does not follow, of course, that one may be held guilty of an offense for giving mistaken advice as to the law. If it is given in good faith as representing the honest though mistaken view of the party giving it, it is not in itself criminal; but you have a right in connection with all other circumstances to consider its erroneous character in determining whether it was given in good faith and for an honest purpose as is the claim made here, or was intended as part of a scheme to obstruct the enforcement of this law.

"IV.

"There is also evidence tendng to show that there was prepared by the defendant O'Connell a form of exemption claim to be presented and filed with the local boards for those who were notified

to report for examination and that large numbers of these forms were furnished to those who joined the American Patriots, for their use before those boards, with the direction to present them to be filed, and that a considerable number were tendered by young men who objected to service; that among other things stated in this form was this language: 'I am certain that notwithstanding all 'the humbug and lies published in the newspapers 'and other publications of the world, there is not 'and cannot be the slightest danger to the United 'States, as this war is simply a war of aggression, 'conquest, and greed on the part of England, and 'England and her agents have secured a vote of 'Congress assisting them in this war, which vote 'was in violation of the Constitution and will be 'reconsidered by the next Congress, who will have 'full power and express directions from the peo-'ple.' You are advised that the matter thus stated was wholly unnecessary to the statement of any legal objection the so-called exemption claim may have otherwise set up; that it would subserve no good or useful purpose in support of any such objection but was well calculated to create antagonism in the minds of those to whom it was furnished, to the law in question and induce them to oppose and refrain from conforming to its requirements and thereby bring about obstruction to its enforcement. You have a right, therefore, to consider it in the light of all the other facts and circumstances in the case in determining whether the purpose of the defendants in putting it forth was the legitimate and innocent one they claim, or was, in fact, intended to subserve the purpose claimed by the Government of provoking and inducing obstruction to the enforcement of this Selective Service Law.

"V.

"The evidence also tends to show that the defendants and other members of the American Patriots and persons in their employ put forth and disseminated large numbers of what are denominated in the evidence as 'Membership Circulars,' circulars soliciting membership in their organization; these circulars among other things, contain this language:

" 'The American Revolution was fought, won, 'and the Republic established, by "Sons of Lib-'erty", an organized minority, in spite of the op-'position of Tories, grafters and grovellers, be-'fore wealth and office in those days, assisted as 'they were by the purchased press, suppressing 'the truth and publishing lies, for the purpose of 'scaring or humbugging the people. At present 'all that these American heroes fought for and 'won is in extreme danger of being lost. To save 'the Republic we have therefore organized the 'American Patriots.'

"This language, when read in connection with the other statements has a distinct tendency to engender opposition and resentment against the act in question and to induce refusal to comply with its requirements, and you have a right to consider it with all the other circumstances in determining whether the purpose of those sending it forth, if you find that it was so sent, was the innocent one they claim or the one claimed for it by the Government.

"VI.

"There is also evidence tending to show that on July 3rd, the defendant Herman B. Smith made an address or speech at a public meeting in Dreamland Rink in this city in which he used this language, in speaking of this act:

'On September 1st. we are going to have a big 'lottery in this country to see which ones of us go 'over there first to be slaughtered. There are a 'lot of boys who do not want to go; they would 'undoubtedly be willing to die in America or to go 'and take part in the wars of this country. Now 'those boys' friends, are going to demand that we 'stand by them. Everyone of us here who are 'above the age must do his share in aiding those 'boys to stand firm in their conscience and say 'they will not go. There is an organization 'throughout the whole nation to see that their fight 'is taken care of. We want your help. We have 'started one in San Francisco, here and there are 'others being started and we want you to give 'your assistance. The Government has asked you 'to buy Liberty Bonds, finance the war and give 'our boys to be maimed and killed. We want to 'save our boys at home, to save them from going 'to the Hell in Europe. Let us stay here and help 'them. Any money that you pay tonight after de-'fraying the expenses of this meeting will go to 'save our boys.'

"This language if not distinctly seditious in character, was at least outside and beyond any such purpose as claimed by the defendants as the objects they had in view, and its natural and only tendency would be to inflame the minds of the public and sway it against the act in question and induce them to oppose and obstruct its enforcement. It was therefore wholly unjustified for any innocent purpose and was not protected by the right of free speech or otherwise, and you have the right to so consider it in determining the defendant's purpose.

"VII.

"In that connection there is also evidence tend-

ing to show that the defendant O'Connell, at a public speech at Lodi on August 4, in contending that the act in question was unconstitutional and that it could not be legally enforced, among other things advised those present not to take the oath or sign any papers whatsoever that would put them in the service, and declared that the men who left the United States for Europe would not return. That the average life of a soldier in the trenches was forty-eight hours, and said, in substance: 'I wonder if it is forty-eight hours, with 'those machine guns on both sides throwing bullets 'so fast that when a man throws up his head he 'is gone and when they stick up their bodies to 'run across "No Man's Land"—you wonder how 'they last forty-eight hours.' That he stated a large number of test cases would be started; that each case would be a separate case, and if a man should be ordered into the service before he could get his case tested the worst that could happen to him would be that he would stay in jail until it was decided, or be out on bail; but that the new Congress would be elected and would repeal the draft law; that the war was not a war of defense, and that the Constitution was being violated because it did not allow them to take soldiers out of the country. If you find this evidence to be true, the advice thus given and the declarations made were not within the right of Mr. O'Connell in any purpose he may have had to test this law nor to secure aid with which to make such test nor by any right of free speech in connection with such object, and you have a right to so consider it in determining the real purpose for which the language was uttered.

"VIII.

"It is not incumbent on the Government, notwithstanding the offense is so charged, to necessarily show that all the parties alleged to have been concerned in that conspiracy were in fact participants in it in order to convict any of them. Because all the defendants on trial are included in one indictment and tried together it is not required that you convict all in order to convict any; or that if you acquit one you must acquit all. If you find that there was a conspiracy as charged, and that any one of the defendants on trial was a party to it, you may convict him although acquitting the other.

"It makes no difference how honest their views may have been; as I have said to you, if they have done acts which under the law would result in obstructing the execution of this statute, and there was a combination between them for the purpose then they are guilty.

"IX.

"Mr. O'Connell: Your Honor said something about a considerable of these claims of exemption having been presented. According to the evidence here I think there is only about half a dozen of them,—I think two or three here.

"The Court: Well, three would be a considerable number of an illegal document.

"X.

"Mr. O'Connell: I want to call your Honor's attention to that part in regard to conspiracy, that the existence of the conspiracy may be shown by circumstantial evidence. I want to except to that portion of it.

"The Court: In 99 cases out of 100, perhaps,

that is the only way it ever was shown or can be shown. The reason for it is this: Men engaged in an unlawful enterprise do not as a rule openly declare their purposes, or the fact that they are working in combination; and so it must be determined by circumstances; as I said to the jury, when so determined, and they are satisfied that the combination existed, it does not make any difference whether there was ever any declaration about it.

"Mr. O'Connell: But where the acts are open then the existence of the conspiracy cannot be established by inference, but must be established directly.

"The Court: Actions that are susceptible of proof must be open in that sense; they may be secret in a way, but they must be susceptible of proof, otherwise they exist merely in the mind and never become overt acts.

"XI.

"Mr. O'Connell: Now one thing more: There was one thing that if you find the effect it makes no difference that they didn't know,—it was something like that, your Honor. I wish your Honor would qualify that by saying that it must be the necessary effect.

"The Court: Oh yes, of course. The law is this: A man is presumed to intend the ordinary consequences of his voluntary act. That results in this: It does not make any difference whether one may know the exact legal consequences of an act he does; if he deliberately does the act he must know at his peril whether it would result in criminal consequences, or not, because of the further principle that ignorance of the law does not excuse. You can readily understand that if ignor-

ance of the law did excuse, it could always be urged as a defense no matter how heinous the charge might be. As a matter of expedience it has been found necessary to adopt as a part of our jurisprudence, the principle that ignorance of the law will not excuse for a criminal act. You can readily understand that if ignorance of the law did excuse it could always be urged as a defense no matter how heinous the charge might be. As a matter of expedience it has been found necessary to adopt as a part of our jurisprudence, the principle that ignorance of the law will not excuse for a criminal act. And it does not make any difference Mr. O'Connell, so long as one deliberately does an act,—it does not make any difference I say whether he knows its legal consequences, or not.

"Mr. O'Connell: But if the result of the act is an incident and not a necessary consequence, then he is not responsible for the incidental act; it must be the necessary and natural consequence of what he does.

"The Court: Yes, the usual and ordinary consequences—what they term the natural consequences."

V.

The District Court and District Judge in making to the jury the foregoing statements quoted from said charge, erred in the following particulars:

1. They deprived the defendants of a trial and determination of the case by a jury.

2. They substantially and practically determined for the jury that the defendants were guilty, and practically instructed the jury to return a verdict of guilty.

3. They incorrectly quoted and stated the evidence and claims of the defendants and thus misled the jury to a verdict of guilty.

4. They substantially and practically decided the case against the defendants and instructed and directed the jury to return a verdict of guilty against the defendants when the judge gave them the following instruction (part II of the quoted portions of the charge):

"As I had occasion to state in your presence in passing upon the motion of the defendants for an instructed verdict, *there is evidence before you which is sufficient* in its legal tendency, that is sufficient as a matter of law, *to sustain the government's theory;* but whether it is such as to satisfy you of its truth is a question wholly for your consideration and determination, as I shall more particularly instruct you." As all the material evidence was in print, and undisputed, the only question being good faith of the defendants, the force and effect of this instruction against the defendants cannot be doubted.

5. They again substantially and practically decide the case against the defendants in immediately thereafter (part II of the quoted portions of the charge) giving the following instructions:

"I should, however, notice the aspects of *some of the facts which the evidence tends to establish, the tendencies of which might not otherwise be readily apprehended by the minds of laymen like yourselves,* that is, men not versed in the law", and then he proceeds to pick out and emphasize against the defendants the portions of the evidence hereinafter specified.

6. The judge was mistaken when he said, (part III of quoted portions of charge), "among other documents which the evidence tends to show were put out and furnished by the defendants through the American Patriots and those in its employ to people who came to its office was a so-called legal opinion admitted to have been prepared by the defendant O'Connell, a copy of which has been put in evidence."

This is entirely incorrect and there is no evidence to sustain it in the following particulars:

A. It was not put out and furnished by the defendants directly or indirectly to anyone.

B. It was not admitted to have been prepared by the defendant O'Connell. The uncontradicted evidence shows that the Government's witness Mengedoth found it August 1, 1917, in an uncompleted state on a desk in Mr. O'Connell's office, or the adjoining office and picked it up, put it in his pocket, took it home with him, did not show it to anybody, and afterwards returned it to Mr. O'Connell and it was produced in court on request, by Mr. O'Connell, in the same uncompleted state. (Tr. pp. 35, 36, fols. 60, 61.) The answers quoted by said judge were entirely changed thereafter.

7. He was also mistaken when he said (in part III of quoted portions of his charge): "And it is not the law, as contended at the trial by the defendants, that if a man reports for service in obedience to the notice to appear, he then loses any right to resort to the civil courts to test the validity of his compulsory service." The defendants did not make any such contention at the trial, or at any other time, but did contend that if the person took the oath and signed the roll he was then in the military service and subject to military law as an enlisted soldier, and could not appeal to the civil courts to test the constitutionality of the draft act, and if he wanted to test the constitutionality of the draft act in the civil courts he must not take the oath or sign the roll as such a soldier. (Tr. p. 73, fol. 119.) Habeas corpus was not the best remedy as was shown by said district judge at this trial in the presence of the same jury in making the following statements and taking the following action in the case of H. H. Mettler:

> "The Court: In the matter of the petition of Henry H. Mettler for a writ of Habeas Corpus, presented on Friday last, I have given the petition

examination in the light of the provisions of the Constitution, the main contention being that the petitioner is held in custody by reason of proceedings taken under the Selective Service Law and that law is an antagonism to the Constitution of the United States. I have carefully examined the provisions of the Constitution and the provisions of this law, in the light of it, and I am entirely satisfied that there is nothing within the provisions of this law which would render it obnoxious to any provision of the Constitution which fell under my observation. While it is not stated in the petition it has been sufficiently manifested at the present trial that the real objection to this act is that it contemplates sending troops abroad; for the purposes of the present war for their participation therein; in the first place, there is nothing in this law which in any wise in itself could be regarded as having that purpose in view, but, in the next place, if there be contemplated such action, and doubtless there is, because we cannot ignore facts which are of public cognizance, in my view there is absolutely nothing in the Constitution which would inhibit such a disposition of our troops in a time of necessity and for the purpose of carrying on the war in which we are engaged in such manner and by such means as will best conduce to its speedy and its successful conclusion.

"The petition for a writ of habeas corpus will accordingly be denied.

"Mr. O'Connell: We will take an appeal. Will your Honor fix the bail?

"The Court: I will consider that later; you can make an application. Where is the defendant now?

"Mr. O'Connell: He is up in the Stockton jail.

"Mr. Preston: As I understand it the defendant is in charge of the military already.

"Mr. O'Connell: He is in charge of the sheriff in the Stockton jail.

"The Court: He may be in the immediate custody of the Sheriff of San Joaquin County, but nevertheless his custody may be under the direction of the military authorities.

"Mr. Preston: I am informed, unless Mr. O'Connell has information to the contrary, that this prisoner is at Alcatraz, having been taken there yesterday or the day before.

"Mr. O'Connell: That is news to me.

"The Court: You can examine into the situation and present your application at a future time.

"Mr. O'Connell: May I present an amended petition, if your Honor please, if the facts justify it, so that the entire question will go up?

"The Court: The order will simply be that this petition be denied. You have a right to present any further petition that you see fit."

8. Said judge erred in stating to the jury that the quoted portions of said opinion: "The advice given in this opinion was therefore erroneous and misleading as not stating the law." The advice was not erroneous or misleading. It did state the law.

9. He selected and quoted from only certain small portions of said unfinished legal opinion on the constitutionality and effect of the Draft Act given in the form of questions and answers thereto, which portions he told the jury "do not state the law" and told the jury that the legal opinion and conclusions were unsound and that the draft act and rules and regulations were constitutional and valid and that "the advice given in this opinion was therefore erroneous and misleading as not stating the law", and that the jury had the "right in connection with all other circumstances to consider its erroneous character in determining whether it was given in good faith and for an honest purpose as is the claim made here, or was intended as

part of a scheme to obstruct the enforcement of this law"; (part III of the quoted portions of the charge).

10. He stated (in part IV of the quoted portions of the charge) that "Large numbers" of "the claim of exemption were furnished to those who joined the American Patriots for their use before those boards", and that a "considerable number were tendered by young men who objected to the service", whereas as a matter of evidence and fact no more than 3 to 6 were presented; and when the discrepancy was called to his attention he declared to the jury that said claim of exemption was "an illegal document", and that "3 was a considerable number of an illegal document", and did not quote all of said document.

11. He also stated (part IV of the quoted portions of the charge) to the jury that the portion of the sentence which he quoted from the claim of exemption "was well calculated to create antagonism in the minds of those to whom it was furnished, to the law in question and induce them to oppose and refrain from conforming to its requirements and thereby bring about obstruction to its enforcement." He thus usurped the province of the jury, and told them the defendants were guilty and in connection with the other instructions and rulings during the trial appearing of record determined the case for the jury and practically directed a verdict of guilty.

12. He quoted but a small portion of one sentence of the said claim of exemption filed by the defendants Carey and others with the draft board setting up the unconstitutionality of the draft act as one of the grounds of his claim of exemption and unduly and unfairly emphasized that portion and substantially told the jury it was sufficient evidence to convict of a purpose of obstructing the enforcement of the draft act, although if he quoted it in full it would show that the whole document was innocent and legal, but he did

not give the whole document to the jury. (Part IV of the quoted portion of Judge's charge.)

13. He quoted only a small portion of the "membership circular" soliciting membership and stated that "it has a distinct tendency to engender opposition and resentment against the act in question and to induce refusal to comply with its requirements", and that the jury had the right to so consider it, which was a substantial and practical direction to return a verdict of guilty, (part "V" of the quoted portions of the charge.)

14. He erred in instructing the jury that the part so quoted had such "a distinct tendency," as it had no such tendency, as will appear from reading said quoted part, being as follows:

> "The American Revolution was fought, won and the Republic established by Sons of Liberty, an organized minority, in spite of the opposition of Tories, grafters, and grovellers, before wealth and office in those days, assisted as they were by the purchased press, suppressing the truth and publishing lies, for the purpose of scaring or humbugging the people. At present all that these American heroes fought for and won is in extreme danger of being lost. To save the Republic we have therefore organized the American Patriots."

15. He quoted from (part VI of the quoted portions of the charge) and unduly emphasized against all the defendants, a portion of a speech delivered at a public meeting July 3, 1917, by the defendant Herman B. Smith, which on the undisputed evidence, was at least 9 days before the agreement to form the American Patriots, and at least 9 days before there was any understanding, or any possible conspiracy, or agreement, or even communication between the said Smith and any of the other defendants, and with which speech, or meeting, none of the other defendants had

been in any way whatever connected by the evidence or otherwise, and of which they had no knowledge until said evidence was produced in this trial.

16. The said meeting was held under the protection of the Constitution and laws of the State of California for the purpose of considering and adopting a petition to Congress for a redress of grievances and the repeal of certain laws and the said speech was in support of said petition which had been previously presented to that meeting, at which meeting none of the other defendants were present according to the Government's uncontradicted evidence.

17. The said judge erroneously stated that the jury had the right to consider it in determining the purpose of the defendants, and substantially and practically instructed them that they could convict the defendants thereon, his comments thereon being as follows:

> "This language if not distinctly seditious in character, was at least outside and beyond any such purpose as claimed by the defendants as the objects they had in view, and its natural and only tendency would be to inflame the minds of the public and sway it against the act in question and induce them to oppose and obstruct its enforcement. It was therefore wholly unjustified for any innocent purpose and was not protected by the right of free speech or otherwise, and you have the right to so consider it in determining the defendant's purpose."

18. He selected and disconnected from the speech of Daniel O'Connell at Lodi, Cal., on August 4, 1917, certain words and parts of sentences, and parts of some of the answers to the questions suddenly propounded to Daniel O'Connell then and there, and never quoted or mentioned the other portions of said speech, or the whole of the answers, or the questions to which they were answers, and unduly emphasized

those words, sentences and parts so quoted, and substantially directed the jury that they were sufficient to convict all the defendants; (part "VII" of quoted portions of charge.)

19. In said instruction part "VII" of the quoted portions of the charge, he picked out and stated to the jury certain portions of the testimony of one of the government witnesses, a newspaper reporter, present at said meeting in Lodi, and unduly and unfairly emphasized the testimony of said witness, but did not pick out or state any of the other portions of the testimony of the same witness which qualified and gave a different meaning to those parts which he did pick out and state.

20. He did not state any portion of the testimony of several other witnesses for the Government who were present at said meeting and gave a different report and testimony of what was said and done there, which was more favorable to the defendants than that so picked out and quoted.

21. In the other portions of the testimony of the witness (Tr. pp. 57, 58, 59, fols. 94-98), so quoted by said Judge in his charge, it appeared that the defendant O'Connell explained that "if they wanted to test the constitutionality of the draft act they could not sign or take the oath as that would put them in the military service under military law and they could not apply to the civil courts for a writ of habeas corpus for the purpose of testing." He also said that "some of the boys would come back, but who knows." He also said that he would bring the cases individually and collectively to the Supreme Court of the United States and secure a decision from that Court on the constitutionality of the draft act within three or four months, and "when it was said about a large number of cases Mr. O'Connell said that the question was being raised all over the country, in New York and other places, and

that those would all go to Washington, and probably would be argued together by the best counsel in the United States." He also mentioned the opinions of Daniel Webster and Hannis Taylor that the troops could not be taken out of the country and that this was not a war of defense and the troops could not be taken out of the country. A fair reading of the testimony of said quoted witness shows that the statement about the average length of life of the men in the trenches was in the impromptu answer to the question: "Who do you want to win the war?" The answer appearing from said testimony to have been (pp. 58-59) in substance as follows: "What do you mean by winning the war? I cannot see how anybody can win; that there never was a good war and never was a bad peace and if they went on piling up all our young men dead he did not consider that winning (Fol. 97.) Every intelligent person here knows that these young fellows who go across the ocean will never come back. We know that the average life in the trenches is about 48 hours. I wonder if it is 48 hours with those machine guns on both sides throwing bullets so fast that when a man throws up his head he is gone, and when they stick up their bodies to run across 'No Man's Land' to the other trenches, you wonder how they even last 48 hours in the trenches. Everyone of these young men who go will never come back—there may be some who may, but we don't know."

22. The said Judge substantially and practically instructed the jury that if they found those disconnected portions of that testimony so quoted by him, true, without mentioning the other portions of the testimony, the defendants were guilty and that the jury had the right to so find them guilty. (Part VII of the quoted portion of the charge.)

23. The said Judge in said instructions as quoted told the jury that they could convict anyone of the defendants, and acquit all the others, without explaining

to the jury how one person could conspire with himself.

24. In said quoted portions of the charge said Judge erroneously instructed the jury as follows: "It makes no difference how honest their views may be; as I have said to you, if they have done acts which under the law would result in the obstructing of this statute, and there was a combination between them for the purpose, then they are guilty."

25. The said Judge erroneously instructed the jury that the existence of the alleged conspiracy might be shown by circumstantial evidence, and refused to instruct the jury that where the acts are open, then the existence of the conspiracy can not be established by inference, but must be established directly.

26. The said Judge refused to instruct the jury that if the result of the act is an incident, and not a necessary consequence, then he is not responsible for the incidental result, and it must be the necessary and natural consequence of what he does. (Part XI of the quoted portions of the charge.)

27. The said District Judge erred in stating (part VII of quoted portion of charge), in relation to speech of Daniel O'Connell at Lodi, Cal., the following "If you find this evidence to be true, the advice thus given and the declarations made were not within the right of Mr. O'Connell in any purpose he may have had to test this law, nor to secure aid with which to make such test, nor by any right of free speech in connection with such object, and you have a right to so consider it in determining the real purpose for which the language was uttered." The parts of said speech were those set forth in the foregoing subdivisions 17 to 21 of this division IV of this amended assignment of errors, and the said statement of said District Judge is incorrect as they were within the rights of Mr. O'Connell, and they are incorrect in fact as they are

not a full or correct statement of what was said as has been shown hereinbefore.

VI.

REFUSAL TO DIRECT VERDICT AT CLOSE OF CASE. NO EVIDENCE OF ANY ALLEGED CONSPIRACY.

Said District Court erred in denying defendants' motion for an instructed verdict of "not guilty" at the close of all the evidence in the case, because:

1. There was no evidence whatever of any of the conspiracies alleged in either count of the indictment. There was no evidence of any agreement, understanding, or arrangement or meeting of minds, or of any kind, in any way, shape, or manner, on any subject, or proposition other than the organization of the corporation called the "American Patriots", and the purposes for which that corporation was organized; and the first meeting, or understanding, or communication of any kind or nature, whatever, on that subject, or any other, was on said July 11, 1917, when the three defendants, Daniel O'Connell, David J. Smith and Herman B. Smith met with others not defendants, in a social meeting, and as a result of discussion, agreed to form the American Patriots. There was no evidence whatever of any other agreement or conspiracy.

2. There was no evidence whatever of any communication between any of the defendants, or with any of the defendants on any subject prior to that evening of July 11, 1917, except that the defendant Herman B. Smith once about July 1, 1917, requested the defendant Daniel O'Connell to address a meeting on the evening of July 3, 1917, and Mr. O'Connell declined saying that he was going to be out of town that evening.

3. The organization of the American Patriots, the purposes of which are undisputed, and recorded, and

the issue of its charter was a conclusive judgment of the state of California, that the purposes were lawful, and such incorporation, or corporation, could not be made the basis of a charge of criminal conspiracy on the part of any of its members. The only things that could be done in pursuance of said corporation and charter must necessarily be lawful.

4. All the objects and purposes of said corporation are the following:

"To defend, maintain and enforce the letter and spirit of each and every provision of the Constitution of the United States and the Constitution of California.

"To challenge and test in the courts each and every Act of Congress and the executive department which violates said Constitution.

"To test the constitutionality of the so-called draft or conscription act now sought to be enforced.

"To test the constitutionality of every act of the executive and legislative departments forcing any person in the land or naval forces of the United States to render military services in Europe.

"To amend the Constitution of the United States so that war can never be declared except by vote of at least two-thirds of the registered voters of the United States.

"To amend the Constitution of the United States so as to incorporate therein the initiative, referendum and recall substantially as contained in the Constitution of California.

"Neither profit, nor profit sharing, nor dividends nor dividend sharing, nor any financial gain, to any of the members, or otherwise, shall ever be any of the objects of this corporation."

5. Near the close of the Government's evidence, and after the organization, charter, objects, and purposes of said corporation was in evidence the Dis-

trict Judge in admitting the demurrers and records in the cases of U. S. vs. Gambo, and U. S. vs. Cohen in evidence so ruled and stated; his ruling being as follows:

"The Court: Mr. O'Connell here is the situation: Your defense as I understand it—the defense of the defendant—is that being honestly of the opinion that this act was unconstitutional that you took steps to organize this corporation, the American Patriots, by reason of the fact that you felt you were entitled to have an aggregation contribute because it was too onerous upon any one man; that you accordingly gathered together in that form with the genuine and honest purpose of testing this law, the constitutionality of it, gathered together these people. Now of course, there is no question but what either an individual as I shall be called upon to advise the jury—has the right in good faith to test any law that affects his rights, his liberty, his life—and as you have requested in your proposed instructions; but the prosecution certainly has the right to show that that was not the real object of this corporation at all; they have the right to show that the methods pursued were not in harmony with any such purpose at all; they have the right to show that this corporation, not only through its individual members, made declarations which were at variance with any such purpose, but issued propaganda which was of a nature to be against such a purpose; that is, I mean a purpose that went beyond any mere desire to test the act and to deter and induce others to refuse to subscribe to the act. That is all they are trying to do. That is perfectly proper. *If it is found by this jury that the purposes of this corporation and the acts done under its organization were as you say, and* ***not as the prosecution claims then, of course, you***

cannot be convicted; on the other hand, if it appears that the corporation was used merely as a cloak through which to reach a large number of people with a course of solicitation and representation and propaganda which would be in its nature calculated to induce others not to enlist, or not to subscribe to the draft act, then the jury would have the right to find that that was the purpose of the corporation, *instead of the genuine one of testing the constitutionality of the act. That is the whole question.* And this is directed to that. I want you to understand the reason of my rulings as we go along."

6. If there were any *unlawful* things said, or written, or circulated, or done, they *could not be in pursuance of the objects and purposes of that corporation* or in carrying out *its* objects and purposes, as necessarily only lawful acts could be done in carrying out the objects and purposes of such a lawfully authorized and organized corporation. Such acts must necessarily be in pursuance of, or carrying out, the objects of *some other* conspiracy; or be merely apart from *any* conspiracy and offensive in themselves only.

7. But there was no evidence whatever of any other "conspiracy or agreement", and each count is *founded* on a charge of conspiracy, and not on the acts themselves, and therefore *each charge of criminal conspiracy falls,* "as conspiracy is the crime and single, no matter how diverse its objects", and the case falls with the failure to prove the alleged conspiracies.

OVERT ACTS NOT CRIMES, AND NOT UNLAWFUL.

8. The first act alleged and proved in point of time was the organizing of that corporation July 14, 1917, which we have seen was innocent and lawful. The second is that of the defendant Carey on August

4, 1917, filing a claim of exemption setting up his parents' dependence, and the unconstitutionality of the draft act, and his readiness and willingness to fight for the United States at any time, but that "I am certain that notwithstanding all the humbug and lies published in the newspapers and other publications of the world, there is not and cannot be the slightest danger to the United States, as this war is simply a war of aggression, conquest, and greed on the part of England; and England and her agents have secured a vote of Congress assisting them in this war, which vote was in violation of the constitution and will be reconsidered by the next Congress who will have full power and express direction from the people." (Tr. p. 5, fol 9.) The third overt act charged was that on August 4, 1917, Daniel O'Connell went from San Francisco Cal., to Lodi, Cal. The fourth overt act charged was that on or about August 1, 1917, Daniel O'Connell prepared and caused to be distributed a document entitled "Legal Opion and Advice on the Conscription Law to American Patriots." These acts as charged are in themselves innocent and lawful and we must resort to the evidence to see if there was any evidence to prove the crimes charged, or if they were criminal, or if they show any *other* conspiracy.

9. There was *absolutely no evidence whatever of any intent to obstruct* enlistment or recruiting or the operation of the draft act. The *only intent* of which there was any evidence was to test the constitutionality of the draft act by carrying one or many cases direct to the Supreme Court of the United States, which Court would decide the point within 3 or 4 months and to raise the money to pay counsel and other expenses of that testing by organizing this corporation American Patriots, and induce persons to pay $5.00 to join and $1.00 a month to pay these expenses. Incidentally there were things said against England

by Irishmen and the descendants of Irishmen, *but was for the purpose of securing members for, and contributions to, the American Patriots, not with the intent to obstruct enlistment, or recruiting, or the operations of the draft act.*

10. There was no evidence whatever that any of the defendants ever advised, or attempted to induce or persuade any person not to register, or not to report for the physical examination, or not to take the physical examination, or not to obey any order or regulation or duty, or evade any, under the draft act. On the contrary it was overwhelmingly proved by all the evidence for the Government and defense, that all were specifically advised and directed to register, take the physical examination, and follow out every step of the law, and comply with every requirement of the law, but at the last step if they wanted to contest the constitutionality of the draft act they must not sign the roll or take the oath as that put them in the military service as an enlisted soldier and subject only to military law and courts and could not appeal to the civil courts to test the constitutionality of the draft act.

11. *The undisputed evidence* was that the defendant Daniel O'Connell had repeatedly said in public speeches, and to the American Patriots that it was the duty of everybody who believed the draft act was constitutional to enlist and that all those persons and newspapermen, and magazine writers, who were clamoring for war should be forced to go to war, and that it was his opinion and belief as a lawyer that the Selective Service Act was unconstitutional when used to compel the men to fight in Europe, which was not and could not be a war of defense as referred to in the Constitution of the United States; that it would cost more to test its constitutionality than a few men could afford to pay, being at least $5,000 and the best means of raising the necessary money co-operatively

was by organizing a corporation for that purpose, and the American Patriots was organized. The "circular letters", the "film productions", the wagon on the street, all requested people to join the American Patriots and made no other request. The attacks on "John Bull" and England and the pictures of patriotic scenes, and of acknowledged American Patriots and Presidents were all for the plain purpose of arousing a distinct American patriotism and securing more members for the American Patriots. There was not a thing said, written, or done, for any other purpose, or with any other intent. *There was not a particle of evidence of any kind or nature to show any other purpose or intent.* There was no evidence whatever of any intent or purpose to obstruct recruiting, or enlisting or the operations of the draft act.

12. There was no evidence that any person refused to enlist, or be recruited, or be drafted, or obey any orders under the Selective Service Act, or its rules and regulations in consequence, of or as a result of, anything that any of the defendants did, or said, or wrote, or caused to be written, or printed, or circulated. The uncontradicted evidence was that all the persons liable to the service or draft, who became members of the American Patriots, long before they ever heard of the American Patriots, or any of the defendants, of the determined opinion from what they had read, and heard from U. S. Senators, and other public men, that the Selective Service Act was unconstitutional, and were determined to test its constitutionality in the courts and joined the American Patriots as the best means of testing it; and there was no evidence whatever that any other persons were influenced in any way, shape or manner.

13. The undisputed evidence was that each and all of said persons were thoroughly and honestly convinced that said Selective Service Act was unconsti-

tutional, and that they were testing it solely because of that honest opinion and belief, and each and all declared that if the law was declared constitutional they would immediately enlist; and that they were ready to enter the service to fight in the United States, but objected to fighting in Europe until the Supreme Court of the United States finally decided that it was constitutional.

14. *This want of evidence* forced the district judge to repeatedly change his rulings and during the latter part of the trial to rule in the presence of the jury and later instruct the jury that it did not make any difference what the intent of the defendants might be or how honest and good their views or motives were, yet if the defendants said or did "anything which would be calculated to bring about and produce a state of mind in the public with reference to this act which would be calculated to result *in any one* subject to its provisions deterred from acquiescing in its requirements subscribed to them would be pertinent", and also that the defendants would be guilty, as the only possible excuse on the evidence for not directing a verdict of not guilty.

15. If the Espionage Act, or the Selective Service Act, or any other Act of Congress is so construed as to make the defendants guilty of a crime on this evidence, then such Acts of Congress plainly violate the First Amendment of the Constitution of the United States.

16. There was not a particle of evidence to show that any of the statements as to fitness or liability or anything else made by the defendant Carey and others in the claim of exemption were false, or that their opinions were false, or that they either were unfounded.

17. There was not a particle of evidence that the statements oral and written, and also the actions of

the defendants were not made in good faith, and in the honest belief that they were all tending to the accomplishment only of the recorded purposes of the American Patriots.

18. The said statements made in said claim of exemption, on the wagon "John Bull is ruling and ruining us, what are you doing about it? Join the American Patriots" were plainly a patriotic warning of the danger of the control or influence of the government of England in this country, and to unite to drive that influence out before it would be too late. Their ancestry was proof of the honesty of that belief.

19. Everything that the defendants said and did as shown by the evidence, was plainly protected by the First Amendment to the Constitution of the United States, and Section 37 of the United States Penal Code, and exclusively within the jurisdiction of the State of California, and protected by Sections 1, 2, 9, 10, of Article I of the Constitution of the State of California, and other laws of that state and the Espionage Act, Selective Service Act, or any other Act of Congress making a crime what was so said and done by the defendants according to the evidence in this case were unconstitutional, null and void.

VII.

REFUSAL TO QUASH THE INDICTMENT AND DIRECT A VERDICT OF ACQUITTAL.

1. The District Court erred in not granting defendants' motion to quash the indictment and direct a verdict of not guilty at the close of the Government's evidence in that the Government had offered no evidence whatever to prove any of the conspiracies alleged in any of the counts of the indictment, nor any of the overt acts, nor any acts, done by any of the defendants in pursuance of any such conspiracy as al-

leged in any of the counts of the indictment. (Tr. pp. 94-99.)

2. The District Court erred in denying the motion of the defendants to instruct the jury to render a verdict of "not guilty" at the close of the Government's case, in that no evidence had been offered to prove any of the conspiracies alleged in either count of the indictment, or any of the overt acts alleged to have been done in pursuance of said conspiracies, or any act done in pursuance of any alleged conspiracies, or of any crime committed against any law of the United States.

3. The District Court erred at the close of the Government's case, in refusing to rule that each and all of the acts of each and all of the defendants was done within the protection of the Constitution of the United States, and particularly the first amendment to said Constitution and the constitution and laws of the State of California, protecting free speech, free press, public assemblage and petition for redress of grievances and any act of Congress pretending to make any of said acts of the defendants a crime, would be, without authority and in violation of said Constitution of the United States, and null and void.

VIII.

ERRORS IN ADMISSION OF EVIDENCE FOR GOVERNMENT.

1. The District Court erred in admitting evidence of a conversation between the defendant E. R. Hoffman, and one William J. Mowry, in the absence of all the other defendants in August 1917, and before any evidence was offered by the Government to prove either, or any, of the conspiracies alleged in either count of the indictment (Tr. p. 44, fol. 74.)

2. The District Court erred in admitting in evidence the dodger advertising a public meeting to be

held in Oakland, Cal., July 2, and another meeting at Dreamland Rink in San Francisco, Cal., on July 3, 1917, at which latter meeting, the defendant Herman B. Smith presided, and none of the other defendants were to be speakers, and there was no evidence whatever that any of the other defendants were present, and the evidence was that none of the other defendants were present at said meetings, and before any evidence had been offered of any of the conspiracies alleged in either count of the indictment and before any evidence had been offered of any communication direct or indirect between any of the defendants, or with any of the defendants or any evidence that the defendants were even acquainted with each other. (Tr. p. 47, fol. 78.)

3. The District Court erred in admitting in evidence the transcript and reading to the jury a reporter's transcript of remarks made by the defendant Herman B. Smith, as presiding officer at the said meeting of July 3, 1917, at which meeting none of the other defendants were present, and there was no evidence that they had anything whatever to do with said meeting or knew anything about it, and before there was offered any evidence by the government to prove any of the conspiracies alleged in either count of the indictment. (Tr. p. 47-48, fol. 79-80.)

4. The District Court erred in admitting in evidence at said remarks of the defendants Herman B. Smith at said meeting at the opening of which meeting there was read a petition to the Congress of the United States of America entitled, "Petition to the Congress of the United States of America. To the Honorable Congress. We, thousands of citizens in San Francisco in the United States, in Dreamland Rink, in San Francisco, upon the eve of the anniversary of the Declaration of Independence, July 3, 1917, in order to secure a redress of grievances, pe-

tition your Honorable body:" Thereafter specifying various grievances. (Tr. pp. 49-50, fols. 81-82.)

5. The District Court erred at the close of the government's case in not granting the motion of the defendants to strike out from the evidence the printed copies of the Socialist Platform known as document number five, sent direct from Chicago to the voters throughout the country belonging to the Socialist party, and called the majority report of the Socialist Platform, adopted April —, 1917, (Tr. pp. 50-51-52-53 fols. 83-84-85-86), which document was delivered to each of the jurymen, and read to the jurymen, and which document had been taken from the hotel in which they were placed by said David J. Smith, and the secretary of the Socialist Party in San Francisco, acting for said Socialist Party, on June 2, 1917, and seized by the special agent of the department of justice June 2, 1917, and held in his custody thereafter. And which were not connected in any way with any of the other defendants, and which on the close of the Government's evidence, the defendants moved to strike out from the evidence, because they had not been connected in any way with the other defendants, (tr. pp. 88-89, fols. 143-144), to which motion the said District Judge answered as follows:

> "The Court: Mr. O'Connell, this charge is conspiracy to do what? To obstruct the execution of the so-called draft act. As I had occasion to remark this morning, obstruction means any method of procedure which might either directly or indirectly tend to an obstruction of the execution of the law; in other words, anything which would be calculated to bring about and produce a state of mind in the public with reference to this act which would be calculated to result in anyone subject to its provisions being deterred from acquiescing in its requirements, subscribing to them, would be a pertinent matter to go before the jury

as tending to show what the purpose of the defendants was in anything they did. Now it is not at all essential that any means employed by any one of the defendants if there was a conspiracy, which is for the jury to find, it is not at all material from what source any of the propaganda or means that might disseminate by defendants among the public for such purpose would come. It might be literature produced by an organization in Europe as to which the defendants so far as they were concerned had never had any knowledge as to its organization, much less being members of it, and yet if they availed themselves of the emanations from a source of that kind, which by reason of its character was calculated to further their ends, if they were using it and disseminating it *or were on the point of doing so,* it is entirely competent as evidence in view of the nature of this charge. *The evidence in this case it seems to me does sufficiently disclose this to enable it to go to the jury.* I do not pass upon the weight of the evidence at all, I pass upon its admissibility, its relevance to the issue, and I am bound to leave the weight that it shall be accorded in the great sum of evidence, to the jury; but it seems to me that under the evidence in this case, if there be found and I think there was read matter from this exhibit which, as I suggested a moment ago might be, or would be, calculated to influence the minds of people to whom it was distributed, which would induce them, if responsible to this draft act, to refuse to conform to it and so far as lay in their power to resist its execution, I don't see why it would not be admissible.

"Mr. O'Connell: *If it is connected,* if your Honor please.

"The Court: *That is just what I have passed upon. I think the evidence here is sufficient to connect it.* One of the defendants it was very

clearly shown,—I am talking about what the evidence tends to show, because the jury will find out whether it is shown, but if it—not shown to their satisfaction that he had nothing to do with it then of course they will disregard it; but for the purposes of a motion of this kind, if there is evidence which tends to show that one of the defendants *during the existence of the conspiracy,* if the jury shall find that one was in existence, had to do with the literature of this kind for the purpose of aiding or assisting in its distribution, *or independently for himself,* distributed it and it was of a character that might further the purposes alleged to have been the object of the conspiracy, it is perfectly competent.

"Mr. O'Connell: *My objection of course, was that it had not been connected.*

"The Court: Just recall the evidence on the subject. The hotel keeper testified to facts which if the jury believes it, would be sufficient to connect the defendant David J. Smith with this literature. *That makes it competent to go before the jury for their consideration.* I will overrule that motion and give you the benefit of an exception."

6. The District Court erred at the close of the government's case, in refusing to strike out all the evidence of the speech of Herman B. Smith on July 3, 1917, at Dreamland Rink, which meeting was started with a petition to congress on certain grievances on repeal of the conscription law, and anything done in that meeting was under the protection of the Constitution and laws of the United States, and under the protection of the constitution and laws of the state of California. It was within the exclusive jurisdiction of the state of California, and its laws protecting public meetings, free speech, and free press. Those subjects being prohibited from any legislation on the part

of congress. On which motion the Court ruled as follows:

> "The Court: It does not make a particle of difference whether what has been shown here to have been said by Herman B. Smith on that occasion was expressly authorized by the laws of California. The question here is and the only question is whether or not those utterances were in keeping with what the government claims to have been a fact here, a propaganda of a method or procedure and utterance with reference to this law which was calculated to, and which was intended to, obstruct its execution. It might well be or might possibly be something that would be found in the statute of the States or in the constitution of the state. If the use made of it by one engaged in such an enterprise was such as to give it a place in the sum and substance of evidence tending to show that there was being carried on a purpose to obstruct a federal statute, the fact that it was a part of the law of the state would not in any way, shape or manner affect its admissibility. The fact that *they* were protected in that meeting from any prosecution by the state, could not to any extent affect the question of either the admissibility of the evidence or its effect here when considered for the purpose of a prosecution of this kind. Doesn't that appeal to you as such?
>
> "Mr. O'Connell: To be frank with your Honor, it does not.
>
> "The Court: The fact is that was not a fair question because it is directly in accord with your theory. However, that is the view that I entertain. The motion to strike out that evidence will have to be denied." (Tr. p. 90, fol. 146.)

7. The District Court erred in denying the motion of defendants to strike out the evidence of the dodger which was printed and distributed advertising the meeting of July 3, 1917, in the Dreamland Rink, as

there was no evidence connecting the dodger, or the meeting, with any of the defendants other than Herman B. Smith, and there was no evidence offered to prove that there had been any conspiracy of any kind between any of the defendants at that time, or prior thereto, or that there had been any communications whatever direct or indirect, between any of the defendants at that time, or prior thereto. (Tr. pp. 88-89-90-91, fol. 142-147.)

8. The District Court erred in admitting in evidence, and reading to the jury the demurrers and other proceedings in the actions of the United States against Gambo, and United States against Cohen, decided in said District Court of the United States, June 23, 1917, of which none of the defendants, except the defendant Daniel O'Connell, had any knowledge or notice. (Tr. pp. 74 to 76, fols. 121 to 124.)

9. The District Court erred in making the statements hereinafter quoted in the presence of the jury, during the cross examination of the defendant Thomas Carey, by United States Attorney, John W. Preston, at said trial as set forth on pages 161-166, fols. 260-261, of the printed transcript as follows:

> "Q. Why did you slander the country by putting in these things here? (Pointing to the last sentence in the O'Connell claim of exemption, which reads as follows: 'Later on, I shall present in my affidavit, in support of my claim of exemption, a more detailed statement of the facts and particulars upon which the foregoing claim of exemption is hereby made, and for the purpose of laying the foundation for testing all the said rules and regulations, orders, acts, and laws, I am filing with you at this time the foregoing claim of exemption, and whenever there is the slightest danger to the United States or the Constitution of the United States no one will respond quicker or fight better or longer than I will and that without any conscript or draft law, but I am certain

that notwithstanding all the humbug and lies published in the newspapers and other publications of the world, there is not, and cannot be, the slightest danger to the United States, as this war is simply a war of aggression, conquest, and greed on the part of England and England and her agents have secured a vote of Congress assisting them in this war, which vote was in violation of the Constitution, and will be reconsidered by the next Congress, who will have full power and express directions from the people'!

"Mr. O'Connell: We do not admit that he slandered the country.

"Mr. Preston: I say it is slander, and I have a right to characterize it as slander.

"The Court: I will have to tell the jury it is unnecessary to any claim of legal right.

"Mr. O'Connell: We shall except to your Honor's remarks.

"The Court: I shall have to instruct the jury that that language is outside any legal right.

"Mr. O'Connell: We ask to save an exception to your Honor's remarks."

IX.

ERRORS EXCLUDING EVIDENCE OF DEFENSE.

1. The District Court erred in excluding the evidence of good faith and lawful intentions and purposes offered by the defendants to meet the claim and evidence of the government that the defendants were not acting in good faith in testing the constitutionality of the draft act, but had the criminal intent and purpose to obstruct enlistment, recruiting, and the operation of the draft act and for which purpose the Court against the objections of the defendants, admitted certain alleged evidence of bad faith and such criminal intent on the part of said defendants, and the Judge of said District Court answering an objection of de-

fendants to the admission of the records in the case of United States against Gambo, and United States against Cohen, decided in that Court in June, 1917, and referred to on page 74 folio 121 of the printed transcript of this case, spoke as follows:

"The Court: Mr. O'Connell, here is the situation: Your defense, as I understand it—the defense of the defendants—is that being honestly of the opinion that this act was unconstitutional, that you took steps to organize this corporation, the American Patriots, by reason of the fact that you felt you were entitled to have an aggregation contribute because it was too onerous upon any one man; that you accordingly gathered together in that form, with the genuine and honest purpose of testing this law, the constitutionality of it, gathered together these people. Now, of course, there is no question but what either an individual as I shall be called upon to advise the jury—has the right in good faith to test any law that affects his rights, his liberty, his life—and as you have requested in your proposed instructions; *but the prosecution certainly has the right to show that that was not the real object of this corporation at all; they have a right to show that the methods pursued were not in harmony with any such purpose at all;* they have a right to show that this corporation, not only through its individual members, made declarations which *were at variance with any such purpose,* but issued propaganda which was *of a nature to be against any such a purpose;* that is, I mean a purpose that *went beyond any mere desire to test the act* and to deter and induce others to refuse to subscribe to the act. *That is all they are trying to do. That is perfectly proper. If it is found by this jury that the purpose of this corporation and the acts done under its organization were as you say and not as the prosecution claims then, of course, you*

cannot be convicted; on the other hand, if it appears that the corporation was used *merely as a cloak* through which to reach a large number of people with a course of solicitation and representation and propaganda which would be in its nature calculated to induce others to enlist or not to subscribe to the draft act, then the jury would have the right to find that that was the purpose of the corporation, *instead of the genuine one of testing the constitutionality of the act. That is the whole question. And this is directed to that.* I want you to understand the reason of my rulings as we go along."

Thereafter in his charge to the jury, said Judge of said District Court used the following language: "Now, *the theory* upon which the Government's case proceeds is, in substance that the defendants have transgressed the principles I have stated and have violated the law by deliberately and intentionally entering into an unlawful combination or association to thwart, interfere with, and obstruct the carrying out and enforcement of the Selective Draft Act by a course of conduct consisting of a series of acts not only intended but calculated to accomplish this unlawful purpose; *that the organization of the corporation called the American Patriots was not had in good faith with any genuine purpose of testing this law,* but was intended to be used merely as a means through which to secure funds for the use and benefit of those organizing it and with which to conduct a propaganda against the act, with the intent to hamper and defeat its execution and to use the corporation as a mask or cloak for their operations, under the mistaken idea that thereby the individual members will be shielded from responsibility for their acts; that in pursuance of this purpose the defendants and others inspired by them, issued and distributed pamphlets, circulars, advertisements on wagons, legal opinions and other literature, made public speeches and film presentations, and gave private advice to individuals, all of

which was of a character to render it unlawful, and was designed and intended to inflame the minds of the people, and particularly those subject and eligible for military service against the propriety and validity of this act and to arouse active opposition thereto and thereby persuade and induce them to refrain from enlisting in the military service or complying with the compulsory requirements of the act, and thereby to obstruct and interfere with its execution and enforcement. *If you find this theory of the Government to be sustained by the evidence, then it will be your unquestioned duty to find the defendants guilty.*"

In other parts of his charge said Judge also cited and emphasized certain evidence *claiming that it showed want of good faith and criminal intent upon the part of the defendants.* (Parts I and II in Motion for Certiorari; Tr. pp. 88 to 95.)

Said Judge and the United States Attorney frequently during the trial made similar statements, *that want of good faith as showing criminal intent* was one of the issues in the case (Tr. pp. 88 to 95), and said Judge admitted, alleged evidence claimed by the Government to have a tendency to prove such want of good faith, and such criminal intent, and that the defendants did not believe that the draft act was unconstitutional, and only set up that as a pretense, cloak and cover to obstruct enlistment, recruiting, and the operation of the draft act. To meet and disprove this claim and alleged evidence offered on the part of the Government, the defendants offered the evidence set forth in each of the following subdivisions and the District Court erred in rejecting each of said offers, and excluding said evidence as follows:

2. In excluding *as any evidence for the defendants* anything that Mr. O'Connell said after his arrest in any conversations whatever, but admitting anything said so far as it might be any evidence against him, not in his favor, or in favor of any of the defendants. (Tr. pp. 120-121, fols. 143-144.)

3. In excluding *as evidence for the defendants* any conversations or discussions Mr. O'Connell had on the constitutionality of the draft act at any time. (Tr. p. 125, fol. 201.)

4. In excluding *as evidence for the defendants* any conversations had about, or knowledge of, the unconstitutionality of the draft act of May 18, 1917, or the Act of 1863. (Tr. p. 140, fol. 224.)

5. In excluding *as evidence for the defendants,* evidence that when the defendant David J. Smith had in his possession the Socialist platform which had been admitted in evidence, and delivered to, and read to, and by, the jury, he knew that Judge Rose of the United States District Court in Maryland, had made a decision that that literature was not seditious. (Tr. 149, fol. 437.)

The court had previously admitted this Socialist platform in evidence against the defendants, (Tr. p. 52, fol. 86) refused to strike it out (pp. 88, 89, 90, fol. 142, 146, 147), and afterwards declared it to be a seditious publication, and emphasized it in his charge to the jury as quoted in the motion for certiorari, and hereinbefore set forth.

6. In excluding *as evidence for the defendant,* evidence that the Socialist Party got out a petition for the repeal of the conscription law. (Tr. p. 160, fol. 154.)

7. In excluding *as evidence for the defendants,* evidence of the authority which the defendant Herman B. Smith had for concluding that the Socialist Platform was not seditious. (Tr. p. 161, fol. 255.)

8. In excluding *as evidence for the defendants,* evidence that the statement made by the defendant Thomas Carey, in his claim of exemption as set forth as one of the overt acts in each of the two counts of the indictment was *true,* and that he had good grounds

for believing it to be true, and the grounds and evidence, and proof on which he based his belief and opinion, as stated in said claim of exemption, and quoted in said indictment, and which caused him to make that statement in good faith. (Tr. pp. 165-166, fols. 262-263.)

9. In excluding evidence of the conversation between Wal J. Tuska, a practicing lawyer in the Supreme Court of the United States, as well as all the courts of California, of his conversation with Daniel O'Connell about the constitutionality of the draft act in July, 1917, the said Wal J. Tuska having been retained by the said Daniel O'Connell, to assist in testing the constitutionality of said draft act before the Supreme Court of the United States. The said Daniel O'Connell not having been arrested before August 6, 1917. (Tr. p. 167, fol. 264.)

10. In excluding the conversation between the defendant Daniel O'Connell and Mr. Tuska, about taking proceedings to test the constitutionality of the draft act. (Tr. p. 167, fol. 264.)

11. In excluding evidence of any talk between the defendant Daniel O'Connell, and Mr. Tuska about Mr. Tuska being retained to assist Mr. O'Connell as senior counsel, or otherwise, in preparing a test case for the Supreme Court of the United States on the constitutionality of this draft act. (Tr. p. 167, fol. 264.)

12. In excluding evidence of any talk between the defendant Daniel O'Connell, and Mr. Tuska about the expenses of taking the case to the Supreme Court of the United States, and how the money to meet the expenses was to be raised. (Tr. p. 168, fol. 265.)

13. In excluding evidence of the talk between Mr. Tuska, and defendant Daniel O'Connell, about organizing a corporation for the purpose of raising the money to meet the expenses to carry the test case to

the Supreme Court of the United States, which talk was had July, 1917. (Tr. p. 168, fol. 265.)

14. In excluding evidence of what the defendant Daniel O'Connell said on that subject, in that conversation. (Tr. p. 168, fol. 265.)

15. In excluding evidence that Mr. O'Connell told Mr. Tuska in that conversation that he was organizing a corporation for the purpose of raising funds for the purpose of paying said Tuska, a retainer for preparing and presenting this case, and the expenses of testing the constitutionality of the draft act. (Tr. p. 169, fol. 266.)

16. In excluding evidence that Mr. Tuska afterwards inquired from defendant Daniel O'Connell how far he had gotten with the corporation in raising the money to pay the expenses of testing the constitutionality of this draft act in the Supreme Court of the United States, and refusing to allow any further questions to be asked on that subject. (Tr. p. 169, fol. 266.)

17. In excluding the evidence of the decision of Judge Rose of the United States District Court of Maryland, and his charge to the jury which upheld the right to criticize, condemn and seek to repeal, laws, and all efforts in that direction and was referred to by the defendant David J. Smith, and Herman B. Smith, and the other witnesses, as having been read by them, and which was wired all over the country on July 11, 1917, and on which some of the defendants based their opinions that the Socialist Platform was not seditious, and that they had the right to circulate it, and that neither its circulation nor the other acts they were charged with doing here, were in violation of the Espionage Act, or the draft act. (Tr. pp. 169-170, fol. 267.)

18. In excluding from the evidence the printed opinion of U. S. Attorney General Wickersham, filed in 1912, on the constitutionality of sending the military forces out of the country, his opinion being that it

would be a violation of the Constitution of the United States to do so, which opinion on the undisputed evidence was read, and relied upon, by the defendants, and others, in their actions complained of in this case. (Tr. pp. 170-171, fol. 267-269.)

19. In excluding from the evidence the Pope's appeal to the United States government to intervene to make peace and stop the war at once, and the reply of the United States to the said appeal, which some of the defendants had read, and relied upon (Tr. p. 170, fol. 268), as further evidence of good faith of their statements and actions.

20. In excluding from the evidence the records of Congress, showing the debates in Congress on the draft act, and the speeches and claims of the Senators and Representatives that the draft act was unconstitutional, and which speeches some of the defendants testified that they had read and relied upon them, and upon which with other literature, they justified their opinion upon the unconstitutionality of the draft law. (Tr. pp. 170-171, fol. 268.)

21. In excluding from the evidence the argument of Daniel Webster in Congress, December 9, 1814, on the constitutionality of conscription for foreign service, especially in Canada; he claiming in the argument that a draft for such purpose was unconstitutional, and which speech all defendants testified that they had read, and relied upon it as one of the authorities in their opinion that the draft law was unconstitutional and which opinion was then approved and adopted by that Congress. (Tr. p. 171, fol. 267.)

22. In excluding from the evidence the speech of the President of the United States to Congress, dated Jan. 2, 1917, called the "Peace Without Victory" speech, which speech some of the defendants testified that they had read, and relied upon for their opinion and actions, (Tr. p. 171, fol. 269), and which speech declared that the President and people of the United States wanted the war to stop at once without any

belligerent winning and save the further useless slaughter and destruction.

23. In excluding from the evidence the address of Hon. Hannis Taylor to the Congress of the United States, showing by argument and citation of authorities that the Selective Service Act was unconstitutional and void, which address had been produced by the witnesses with the said opinion of U. S. Attorney General Wickersham, as having been read by the witness and marked for identification in the case. (Tr. pp. 80, 81, fols. 129, 131; p. 171, fol. 269.)

24. The defendants offered in proof of the truth of the said statements made in the claim of exemption, and on the wagon, the published speech of Mr. Page, the U. S. Ambassador to England, at Southampton, England, October 18, 1913, in which he said:

"In spite of the great fusion of races and of the great contribution which other nations have made to the hundred millions of people across the sea, and to her incalculable wealth, the United States is yet English led and English ruled." Defendants also offered in evidence the Congressional Record containing the speeches of U. S. Senators and Representatives reciting the number of leading newspapers in the United States in which the controlling interest was purchased by the English government acting by and through Lord Northcliffe and an English syndicate in 1914, and the campaign made by them to obtain a declaration of war by the U. S. Congress against Germany.

But the said District Court ruled that all such evidence was immaterial and irrelevant and rejected all said offers, and thereby erred.

X.

RULINGS ON DEMURRER.

The District Court erred in its order overruling the demurrer to the indictment and to each count of the indictment in the following particulars:

1. The District Court erred in overruling the demurrer to the first count of the indictment in that the facts alleged in said count did not constitute a crime against any law of the United States.

2. The first count was insufficient and uncertain in that the overt acts alleged appeared to be all lawful acts and insufficient with the other allegations to constitute a crime against the United States.

3. The Espionage Act on which it is based violates the First Amendment to the Constitution of the United States and is void.

The District Court erred in overruling the demurrer to the second count of the indictment, because said second count being under the draft act of May 18, 1917, is uncertain and defective in the following particulars: (Tr. p. 14, fol. 23.)

1. It does not allege (pages 4, 5, fols. 7, 8) that any of the persons named or referred to therein, were "male citizens."

2. It *does not allege* that they were male persons, "not alien enemies who have declared their intentions to become citizens, between the ages of twenty-one and thirty, both inclusive," and therefore subject to enlistment or draft, as expressly stated in said act.

3. The allegation of "and who were liable for military service under the said Selective Service Law," *is a mere conclusion of law, and not a statement of any facts, and is to be disregarded.*

4. The second count is laid under section of the Selective Service Act, and is not alleged therein or in any of the counts or anywhere in the indictment that the defendants, or any of them, or any of the persons mentioned in the indictment, as conspiring to make "false statements and certificates as to their liability and as to the liability of 6 persons (named in the indictment) for military service under the provisions of the Act of May 18, 1917, known as the Selective Ser-

vice Law, and the regulations made by the President of the United States thereunder" were officers or persons "charged with the duty of carrying into effect any of the provisions of the Act, or the regulations made, or the directions given thereunder," as only such officers or persons can commit the crime alleged in said second count under said Section 6

5. It is not alleged in said second count, or in said indictment that said defendants, or any person named, or referred to, in said indictment, were required to or had any power or authority to make, or could make, any "statement or certificate as to liability for military service under the provisions of said Act, or any law or regulations" whatever, and therefore showing that defendants come within that section which applies only to persons "who in any manner, shall fail or neglect fully to perform *any duty required of him in the execution of this act.*"

ARGUMENT.

POINT I. PREJUDICE.

Prejudice is presumed from error unless it clearly appears beyond all doubt from the record that the error could not and did not prejudice.

Smith vs. Shoemaker, 17 Wall. 630, 639.

In the case at bar every error is prejudicial as will plainly appear from the following facts:

1. The Court will take judicial notice that during the trial from September 11, 1917 to and including September 25, 1917, the first drafted men were going from their homes to the training camps, and the second battle of the Somme was being fought in France and reported and commented upon daily by the newspapers read by the jurymen, prejudicing their minds daily against the defendants.

2. The District Judge in his various rulings and comments thereon and questions he interjected must

necessarily have given the jurymen as well as spectators the opinion that he thought the defendants guilty and forced defendants *and witnesses at the trial* to give their present opinions and intentions for the future as evidence against the defendants.

3. The District Judge in his charge substantially and practically ordered the jury to return a verdict of guilty.

4. The jurymen were so excited and confused that they did not know of what the defendants were guilty, or on what count they were guilty, and returned an uncertain, indefinite verdict.

5. The bill of exceptions *as allowed are the government's bill of exceptions* as everything that they desired struck out, was struck out, and everything that the government desired put in was put in, without any examination or hearing whatever; *so that this Court con conclude that the transcript puts the government's case in the strongest possible light AGAINST THE DEFENDANTS.*

6. Even this bill of exceptions so settled was sought to be stricken out and the defendants deprived of the benefit of an appeal.

7. Therefore, we say that this Supreme Court should take these circumstances into consideration in considering all the errors hereinafter set forth as prejudicial.

POINT II. CONSTITUTIONAL QUESTIONS.

In the demurrer, and at the trial, and on the motion to quash the indictment and direct a verdict at the close of the government's evidence, on the motion to direct a verdict of not guilty on all the evidence, on the motion in arrest of judgment, and for new trial September 29, 1917; the defendants raised the point that the Selective Draft law of May 18, 1917 *was unconstitutional* so far as compelling service in a foreign country; but the Supreme Court of the United States, after

our appeal and after suing out our writ of error, decided that the law was constitutional (Selective Draft Law Cases, 245 U. S. 366) Jan. 7, 1918; and again decided that it was constitutional so far as compelling military service in a foreign country, (Cox vs. Wood, 247 U. S. 5) May 6, 1918; and therefore all *the other questions* involved in the appeal are properly before this Court for review and decision.

Williamson vs. United States, 207 U. S. 425;
Schenck vs. United States, 349 U. S.

POINT III. CONSTITUTIONAL QUESTIONS.

In the demurrer, and the other above-enumerated proceedings, the question of the constitutionality of Espionage Act of June 15, 1917, as applied to the facts of this case was raised, in that it violated the First Amendment to the Constitution of the United States prohibiting legislation by Congress infringing free speech, free press, and free public assembly. Since then, on March 3 and March 10, 1919, the Supreme Court of the United States has decided the cases of Schenck vs. United States; Frohwerk vs. United States; and Debs vs. United States; 249 U. S.—*but these decisions do not affect the points raised in this case on AN ENTIRELY DIFFERENT STATE OF FACTS;* and we therefore present *that constitutional question as an original question.*

1. In Schenck vs. United States this Court said in discussing that constitutional question on page—. "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act *depends upon the circumstances in which it is done.*"

In Frohwerk vs. United States, page— this Court after quoting from the publications, said:

"It may be that all this might be said or written even in time of war *in circumstances* that would not make it a crime. We do not lose our right to condemn either measures or men because the country is at war."

In Debs vs. United States, page , this Court, after quoting from the publications and speeches, said:

"The defendant addressed the jury himself, and while contending that his speech did not warrant the charges, said: 'I have been accused of *obstructing the war. I admit it.* Gentlemen, I abhor war. I would oppose the war if I stood alone.' The statement was not necessary to warrant the jury in finding *that one purpose OF THE SPEECH,* whether incidental or not, does not matter, was to oppose not only war in general, BUT THIS WAR, and that the opposition was so expressed that its natural *and intended effect would* be to obstruct recruiting. IF THAT WAS INTENDED, AND IF, *in all the circumstances,* that would be its probable effect, IT would not be *protected by reason of its being part of a general program and expressions of a general and conscientious belief.*"

Again on page , this Court, after quoting from the Socialist party "Anti-War Proclamation and Program" adopted at St. Louis in April, 1917, (admitted in evidence in the case at bar over objection) approved by Mr. Debs, said:

"Evidence that the defendant accepted this view and this declaration of his duties at the time he made his speech is evidence that if in that speech he used words tending to obstruct the recruiting service *he MEANT that they should have THAT EFFECT.* • • • We should add that *the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions, unless the* words used had as their *natural tendency and reasonably probable effect* to obstruct the recruiting service, etc., AND UNLESS THE DEFENDANT HAD THE SPECIFIC INTENT TO DO SO IN HIS MIND."

In Schenck vs. United States, 249 U. S. page , this Court says: "Of course the document would not have been sent out unless it had been *intended* to have some *effect,* and *we do see what effect it could be EXPECTED to have upon persons subject to the draft*

EXCEPT TO INFLUENCE THEM TO OBSTRUCT THE CARRYING OF IT OUT."

2. In those cases there appeared NO OTHER PURPOSE than those alleged in their indictments, and that they INTENDED AND EXPECTED the results charged.

3. But in the case at bar, THERE APPEARS AND IS PROVED, THE SPECIFIC PURPOSE *to test in the Supreme Court of the United States, the constitutionality of the draft act to compel service in a foreign country and the organization of a corporation to raise money to defray the expenses of that testing; AND NO OTHER INTENT OR PURPOSE.*

4. *"In these circumstances"* any sparks of speech, or probably exaggeration, or written opinions, or statements, or circulars, which might be offensive in themselves, or otherwise, made for THE PURPOSE OF SECURING MORE MEMBERS FOR THE CORPORATION, American Patriots, and therefore MORE MONEY TO DEFRAY THE EXPENSES OF TESTING the constitutionality of the Draft Act, then *they come clearly within the protection of the First Amendment to the Constitution of the United States.*

To hold otherwise would give the said First Amendment no meaning, or scope, or force whatever, and would make the amendment null and void.

5. The First Amendment to the Constitution of the United States was THE PEOPLE'S AMENDMENT —with which the convention had nothing to do. The constitution itself would not have been ratified BY THE PEOPLE unless this very First Amendment, among other amendments would be immediately put through by *Congress and the several States*—not the Convention. What individual members, or all the members of the convention thought about it is entirely immaterial. The Congress and legislature of the several states informally and legally placing that amend-

ment in the Constitution were merely *carrying out the previous orders and determination of THE PEOPLE.*

Cruikshank vs. United States, 92 U. S. 552.

6. *The language of the amendment is definite and does not admit of any qualification.* Before it was adopted all the *evil* as well as good effects were *in fact* discussed, presented, considered, and weighed; it cannot be said that reasons, arguments, probabilities and possibilities that occur to minds *today* did not occur to the able minds, great reasoners, and debaters, of *those days,* when the people were insisting upon the pledge that it be placed there; and again in Congress when it was framed and passed; and again in the legislatures of the various states, when the action of Congress was ratified. Also when it was followed by the people in the various states legislating on the subject by putting in their several state constitutions, precise provisions for the protection of free speech, free press, and free assembly. Whether it was wise or unwise there can be no doubt about the language *definitely* prohibiting legislation by Congress. This Court will take the law as it finds it.

7. *Desirability,* no matter how great, and *circumstances,* no matter how strong and meritorious, *will not give Congress any power* to legislate, *nor persuade* this Court to approve any such attempted legislation.

Buchanan vs. Warley, 245 U. S. 60;
Hanimer vs. Dagenhart, 247 U. S. 251;
Ex Parte Milligan, 4 Wall 2.

In Buchanan vs. Warley decided Nov. 5, 1917, 245 U. S. 60, this Court said:

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. As desirable as this is and important as is the preservation of the public peace, this aim cannot be accomplished by laws and ordinances which deny rights created or protected by the Federal Constitution" * * * "That there exists

a serious and difficult problem arises from the field of race hostility which is all powerless to control, and to which it must give a measure of consideration, may be freely admitted, but its solution cannot be promoted by depriving citizens of their constitutional rights and privileges."

Constitutional provisions intended as securities for rights of the people may also operate as limitations on legislative power. Atchison vs. Denver, 110 U. S. 679; Monongahela vs. U. S., 148 U. S. 324; Wilson vs. Shaw, 204 U. S. 31.

What cannot be done direct from *defect* of power, cannot be done indirectly. Wayman vs. Southard, 10 Wheat. 50; *It does not depend upon the degree to which it may be exercised.* If it may be exercised *at all,* it is at the will of those in whose hands the power is placed. Brown vs. State, 12 Wheat. 439.

In U. S. vs. Cruikshank, 92 U. S. 552, the Supreme Court says:

> "The United States within the scope of its powers, *as enumerated and defined,* it is supreme and above the states; BUT BEYOND IT HAS NO EXISTENCE * * *. The people of the United States resident within any state are subject to two governments; one state, the other national; but there need be no conflict between the two. The *powers which one possesses, THE OTHER DOES NOT.* * * * The Government of the United States is one of DELEGATED POWERS ALONE. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States, or the people. *The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. IN FACT IT IS AND ALWAYS HAS BEEN ONE OF THE ATTRIBUTES OF CITIZENSHIP UNDER A FREE GOVERNMENT.* It derives its source to use the language of Chief Justice Marshall in Gibbons vs. Ogden, 9 Wheat. 211,

from those laws whose authority is acknowledged by civilized man throughout the world. IT IS FOUND WHEREVER CIVILIZATION EXISTS. IT WAS NOT THEREFORE, A RIGHT GRANTED TO THE PEOPLE BY THE CONSTITUTION. THE GOVERNMENT OF THE UNITED STATES WHEN ESTABLISHED FOUND IT IN EXISTENCE, WITH THE OBLIGATION ON THE PART OF THE STATES TO AFFORD IT PROTECTION. As no direct power over it was granted to Congress, IT REMAINS, according to the ruling in Gibbons vs. Ogden, 9 Wheat. 203, SUBJECT TO STATE JURISDICTION.

"THE FIRST AMENDMENT operating on the national government alone PROHIBITS CONGRESS from abridging the right of the people to assemble and to petition the government for a redress of grievances. The first amendment therefore reads: 'Congress SHALL MAKE NO LAW RESPECTING the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.'"

In Monongahela vs. U. S., 148 U. S. 324, the Supreme Court says: "Obviously, this question, as all others which run along the lines of the extent of *the protection the INDIVIDUAL has,* under the Constitution, against the demands of the Government, is of importance; *for in any society the fulness and sufficiency of the securities which surround the INDIVIDUAL in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.* The first ten amendments to the Constitution, adopted as they were soon after the adoption of the Constitution, *are in the nature of a bill of rights,* and were adopted in order to quiet

the apprehension of many, that without some such declaration of rights *the government would assume* and might *be held to possess the power to trespass upon those rights of persons* and property, WHICH BY THE DECLARATION OF INDEPENDENCE WERE AFFIRMED TO BE INALIENABLE RIGHTS.

"And with respect to Constitutional provisions of this nature, it was well said by Mr. Justice Bradley speaking for the Court, in Boyd vs. The United States, 116 U. S. 616, 635; 'Illegitimate and *unconstitutional practices get their first footing* in that way, namely, by silent approaches and *slight deviations* from legal modes of procedure. *This can only be obviated by adhering to the rule that constitutional provisions for SECURITY of persons* and property *should be liberally construed. A close and literal construction DEPRIVES THEM OF HALF OF THEIR EFFICACY, AND LEADS TO GRADUAL DEPRECIATION OF THE RIGHT,* as if it consisted more in sound than in substance. IT IS THE DUTY OF THE COURTS TO BE WATCHFUL FOR THE CONSTITUTIONAL RIGHTS OF THE CITIZEN, AND AGAINST ANY STEALTHY ENCROACHMENTS THEREON. Their motto should be *obsta principiis,* withstand beginnings."

Again the Supreme Court of the United States says:

"When we are inquiring whether a particular act is WITHIN THIS PROHIBITION, the question is *not* whether the *State* may so legislate as to *hurt itself,* but *whether THE ACT is within the WORDS AND MISCHIEF OF THE PROHIBITION CLAUSE.*" Brown vs. State, 12 Wheat. 440. "THERE MUST NOT BE A CONSTRUCTION THAT WOULD DEFEAT THE PROHIBITION."

Brown vs. State, page 441.

The federal government has no authority to *interfere with the means a state may adopt* to enforce a law which it (Congress) has no right to pass. To the extent of the *powers not granted to the general government,* or denied to the States, the *power of the State is supreme. Congress has not the power to nullify A LAW OF THIS STATE either directly, OR BY PREVENTING ITS EXECUTION.* People vs. Brody, 40 Cal. 198; 6 Am. Rep. 604.

The Constitution of California provides:

> "Every citizen MAY FREELY, SPEAK, WRITE AND PUBLISH HIS SENTIMENTS ON ALL SUBJECTS, being responsible for the abuse of that RIGHT; and no law shall be passed to restrain OR ABRIDGE THE LIBERTY of speech or of the press." Sect. 9, Article I.
>
> "The people shall have THE RIGHT TO FREELY ASSEMBLE TOGETHER TO CONSULT FOR THE COMMON GOOD, TO INSTRUCT THEIR REPRESENTATIVES, and to petition the legislature for redress of grievances." Sect. 10, Art. I.

People vs. Seeley, 139 Cal. 118;
Daily vs. Superior Court, 112 Cal. 94.

It was, and is, for the *State of California ALONE* to say what would be an *abuse* of those rights; and it has in its laws of civil and criminal libel, slander, and disturbing the peace, or attempts to disturb the peace, so provided.

Therefore, on the foregoing authorities, the Espionage Act, or any Act of Congress, OR ANY CONSTRUCTION OF AN ACT OF CONGRESS (and such construction thereby becomes a part of the statute) WHICH IN THE SLIGHTEST DEGREE DIRECTLY OR INDIRECTLY ABRIDGES, the freedom of the press, or freedom of speech, or the right to peaceably assemble, to consider, criticize, denounce, or demand, change, or repeal, of any act, or policy, of the National, or State government, NO MAT-

TER ON WHAT GROUND OR REASON THAT ATTEMPT TO ABRIDGE IS PLACED, IS A PLAIN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES AND ALSO OF THE CONSTITUTION OF THE STATE OF CALIFORNIA, AND ABSOLUTELY WITHOUT POWER, AND NULL AND VOID.

People vs. Brady, 40 Cal. 198; 6 Am. Rep. 604;
New Orleans vs. Abbagnato, 62 Fed. 245; 26 L. R. A. 334;
Western Union vs. Pendleton, 95 Ind. 15; 48 Am. Rep. 695;
In re. Quarles, 158 U. S. 535.

POINT IV. DEMURRER TO INDICTMENT.

Four grounds of demurrer remain good, notwithstanding the decisions since the demurrer was filed in this case. Those grounds are:

1. It was impossible to obstruct, or conspire to obstruct recruiting and enlistment of men between the ages of 21 and 40 at the time alleged in the indictment, (Tr. pp. 2, 3,) June 16, 1917, *as there was no recruiting or enlistment going on at the times alleged,* under the Act of May 18, 1917.

2. Conspiring to induce and persuade male citizens subject to draft to file false claims of exemption from said service as alleged in the first count, is not shown by an *allegation* quoting an attack on England; as that appears in the indictment to be the expressions of the *opinion* of Thomas Carey, the person filing the claim, and not a claim of exemption, or the basis of any claim of exemption.

3. This court will take judicial notice of the fact that the President refused to *recruit or enlist under the Act of May* 18, 1917, *Therefore, it was impossible to obstruct the recruiting and enlistment* of men between the ages of 21 and 40 years under the Act of May 16, 1917, which the indictment charges, if there was no recruiting and enlistment of men 21 to 40 years

old proceeding under a provision of this Act at the times mentioned in the indictment, June 16, 1917, and thereafter.

The Act of May 16, 1917, provides in the Seventh paragraph of Section 1, that

> "The President is * * * * authorized * * * * to raise and maintain by voluntary enlistment, * * * * not to exceed four infantry divisions, * * * * provided * * * * that there shall be no enlistment in said force of men under the age of 25 years at the time of enlisting."

And in Section 7 of the Act it is provided

> "That the qualifications and conditions for voluntary enlistment * * * * shall be * * * * that the recruits must be between the ages of * * * * and forty years, * * * * inclusive, at the time of their enlistment."

So as to the recruiting and enlistment under the provision of the seventh paragraph of Section 1, it was to be of men between the ages of 25 and 40 years, not 21 and 40 years as charged in the indictment.

If it be proved that recruiting and enlistment were proceeding under this seventh paragraph of Section 1 of the act of May 16, 1917, then a foundation is made for the question. It is not alleged that there was recruiting and enlistment proceeding at the times mentioned in the indictment of these defendants. The burden of this proof is on the prosecution.

But the fact is, as is well known, that no recruiting or enlistment is, or ever has been, proceeding under the seventh paragraph of Section 1 of the Act of May 16, 1917. The seventh paragraph of Section one is the provision made in the Act of May 16, 1917, for the "Roosevelt Volunteers" so called, which were never called.

So these defendants could not have obstructed recruiting or enlistment under the Seventh paragraph of Section 1 of the Act of May 16, 1917, because no re-

cruiting or enlistment was proceeding under it or ever proceeded under it.

There is no other provision in the Act of May 16, 1917, for recruiting and enlistment under it.

There is a provision in Section 2 of the Act

> "That the enlisted men required to raise and maintain the organizations of the Regular Army and to complete and maintain the organizations embodying the members of the National Guard drafted into the service of the United States, at the maximum legal strength as by this act provided, shall be by voluntary enlistment, or if and whenever the President decides that they can not effectually be so raised or maintained, then by selective draft; and all other forces hereby authorized except as provided in the seventh paragraph of Section 1."

The enlistment of men to raise and maintain the organizations of the Regular Army was proceeding and continued to proceed under the provisions of the Act of June 3, 1916, and reference to it is made in the first paragraph of Section 1 of the Act of May 16, 1917. The indictment does not charge obstruction of recruiting and enlistment under the Act of June 3, 1916. This recruiting and enlistment, too, was not of men between the ages of 21 and 40 years as charged in the indictment, but of men 18 to 40 years, as provided in Section 7 of the Act of May 16, 1917.

"• • • between the ages of 18 and 40 years, both inclusive."

Moreover, prior to June 16, 1917, the date when these defendants are alleged in the indictment to have conspired and confederated together to obstruct recruiting and enlistment, the President acting under the authority given him by Section 2 of the Act of May 16, 1917, had decided and caused to be published notice that the men for the Regular Army could not be raised by recruiting and enlistment, and that he would and has since raised them by selective draft to the

number of about one hundred thousand or more, and that he would and has since raised eighty or more thousand by selective draft for the National Guard.

So that it is a fact that at all times mentioned in the indictment charging these defendants with obstructing recruiting and enlistment under the Act of May 16, 1917, not only was there no recruiting and enlistment proceeding under the Act of May 16, 1917, but there was no recruiting or enlistment whatever proceeding.

The point of defendant's objection to the question, and all questions directed to proving obstruction of recruiting and enlistment under the Act of May 16, 1917, is that until it is proved that there was recruiting and enlistment under the said Act proceeding at the times mentioned, the questions have no foundation whatever.

The allegations of the second count that the defendants did "conspire and agree together to make and cause to be made *false statements and certificates as to their liability* for military service under the provisions of the Act of May 18, 1917, selective service law" is defective in that it *does not allege* that the defendants were charged with *some official duty* under the provisions of that Act, or *dealing with some person or persons charged with official duty under that act* as "statement and certificate of liability in the Act" refers to some *official* statement or certificate, and *not to the private opinion or statement of private individuals.*

Section 6 of the Act of May 18, 1917, so clearly applies *only* to officers or some persons "charged with the duty of carrying into effect any of the provisions of the Act or the regulations made, or directions given thereunder" as to be *too plain to argue.* (Tr. pp. 14, 15.)

The demurrer should have been sustained to each count. The subsequent evidence was offered on both and confused jury and counsel and all.

POINT V. ERRORS IN ADMITTING EVIDENCE.

The admission in evidence of what any of the alleged conspirators said, or did, or the seizure of literature in the possession of any of them *prior to July 12, 1917*, the date of the first meeting, when it was agreed to form the corporation called American Patriots, was *plain error*, because:

1. The objects and purposes of the corporation, agreement, understanding, or conspiracy were in writing, definite, fixed and not in doubt, and even admitted, and therefore "direct evidence of the fact of agreement or alleged conspiracy was not wanting." Williamson vs. United States, 207 U. S. 451.

2. The alleged undertakings were not of an ambiguous nature. The formal written papers called Articles of Incorporation and printed circulars were already in evidence with the testimony of the first witness, the first day (Sept. 13, 1917) as exhibits 2, 3, (Tr. p. 19, fol. 30; p. 38, fol. 64) showing the full agreement, understanding and alleged conspiracy. The objectionable evidence was admitted on subsequent days.

3. Proof of the alleged conspiracy did not depend upon a variety of circumstances going to show motive or intent.

4. The purposes and motives were openly stated.

5. The nature and character of the dealings were plain, open and above board.

6. It did not in the slightest degree elucidate the inquiry, or assist to a determination founded in truth.

7. There was no limit of the evidence so as to prevent an improper use thereof.

8. It prejudiced the minds of the jury against *all* of the defendants.

Williamson vs. United States, 207 U. S. 450, 451.

9. Acts and declarations before the formation of the conspiracy are not admissible.

People vs. Parker, 67 Mich. 222; 11 Am. State Rep. 578;
Langford vs. State, 130 Ala. 74;
Paul vs. State, 12 Texas Appeal 346.

10. It is necessary that first proof of the conspiracy be made.

Winchester vs. Creary, 116 U. S. 161.

11. A bare suspicion of collusion or concert or understanding is not sufficient to admit evidence of acts or declarations of defendants.

Hart vs. Hopson, 52 Mo. App. 177;
Binford vs. Sanner, 40 Pa. St. 9, 80 Am. Dec. 545;
People vs. Stevens, 68 Cal. 113;
Hewich vs. Saier, 124 Mich. 86, 82 N. W. 879.

12. *Even though it was by the joint act of the defendants if it was not done in pursuance of the conspiracy it was not admissible.*

Sparf and Hansen vs. United States, 156 U. S. page 56.

13. *The existence or nature of a conspiracy cannot be established* by the acts or declaration of one conspirator, *in the absence and without the knowledge or concurrence of the others.*

U. S. vs. Babcock, 3 Dill, 581, 545, 24 Fed. Cas. 14, 487;
Rea vs. Missouri, 17 Wall, 532;
Winchester vs. Creary, 116 U. S. 161;
U. S. vs. Newton, 52 Fed. 275;
People vs. Irwin, 77 Cal. 494;
Cuyle vs. McCartney, 40 N. Y. 221;
Blain vs. State, 33 Tex. Crim. App. 236;
U. S. vs. McKee, 3 Dill. 546; Fed. Cas. 15, 685;
People vs. Parker, 67 Mich. 222, 11 Am. St. Rep. 578;

Dealy vs. U. S., 152 U. S. 539;
U. S. vs. Grodson, 164 Fed. 157;
U. S. vs. Richards, 149 Fed. 443;
Wilson vs. People, 94 Ill. 299;
State vs. Moberly, 121 Mo. 604;
Gill vs. State, 56 Texas Crim. 202, 17 Ann. Cases, 1164;
McDonald vs. People, 126 Ill. 150; 9 Am. State Rep. 547.

14. *Only* those acts and declarations of one conspirator are admissible which are done and made while the conspiracy *is pending, and in furtherance of its object.*

a. Upon an indictment for conspiracy, acts or declarations of one conspirator, made *after the conspiracy has ended, or not in furtherance of the conspiracy, are not admissible in evidence against the other conspirators.*

Logan vs. United States, 144 U. S. 264, 309;
Brown vs. United States, 150 U. S. 98.

15. This Court will therefore order a reversal of the judgment because of the errors admitting and refusing to strike out the following evidence:

a. Seizure June 2, 1917, of the Socialist Party Anti-War platforms by U. S. Agents of Department of Justice.

b. Those printed platforms.

c. Red cards advertising Socialist meeting of June 3, 1917.

d. Demurrers filed in cases of U. S. vs. Gambo and U. S. vs. Cohen filed and overruled June 19, 1917 and verdict and judgment June 27, 1917.

e. Dodgers advertising meeting of July 3, 1917.

f. Speeches of Herman B. Smith at meeting of July 3, 1917.

Logan vs. United States, 144 U. S. 309;
Sparf & Hansen vs. United States, 156 U. S. 51;
Allen vs. U. S., 115 Fed. 3.

POINT VI. REFUSAL TO QUASH INDICTMENT AND DIRECT ACQUITTAL AT CLOSE OF GOVERNMENT'S EVIDENCE.

The government failed to offer any evidence to prove the offenses charged in the indictment and the District Court should have granted the motion to quash the indictment and direct an acquittal at the close of the government's evidence, because:

1. THE CONSPIRACY is the crime, and that is ONE, no matter how diverse its objects.

Frohwerk vs. United States, 249 U. S.

The conspiracy to commit a crime against the United States is itself the offence without reference to whether the crime which the conspirators have conspired to commit is consummated, or agreed upon by the conspirators, in all its details. Williamson vs. United States, 207 U. S. 426.

"The criminality of the conspiracy charged *consisted in the unlawful agreement to compass a criminal purpose.*"

Williamson vs. U. S., 207 U. S. page 449.

2. "The parties must agree to set to work for that common purpose."

Frohwerk vs. United States, 249 U. S.

3. The conspiracy must be proved as laid in the indictment.

U. S. vs. Newton, 52 Fed. 275.

4. One or more of the overt acts must be proved.

U. S. vs. Cassidy, 67 Fed. 698.

5. "All parts of the record are to be interpreted together and a deficiency in one part may be supplied by reference to another."

Hopt vs. Utah, 114 U. S. 488;
Johnston vs. U. S., 225 U. S. 405.

6. Where it plainly appears in a criminal case in which the bill of exceptions states that it contains all

the material evidence, that there is no evidence justifying conviction, this court will so hold.

Williamson vs. United States, 207 U. S. 426;
Wiborg vs. United States, 163 U. S. 426;

8. If the Selective Service Act, the draft law, was declared *unconstitutional* by the Supreme Court of the United States in January or May, 1918, then this *judgment would have to be reversed,* because the draft act was *never a law* and was void from the *beginning,* and there was not and could not be, any obstruction to any *law,* or the enforcement of any *law,* and it is the duty of every citizen sworn to maintain the constitution of the United States, to question every pretended law that does actually violate the constitution.

9. Merely that the law is sustained does not make the acts done in opposition to, or questioning it, *criminal,* even though they might be *unlawful.*

People vs. Powell, 63 N. Y. 88;
Wood vs. State, 47 N. J. L. 461;
People vs. Flack, 125 N. Y. 324, 11 L. R. A. 807.

10. In Williamson vs. United States, 207 U. S. 453, this Court approves as correct law the following instruction to the jury:

> "If men honestly and in good faith sought the advice of a lawyer as to what he may lawfully do in the matter, and fully and honestly lays all the facts before his counsel, and in good faith and honestly follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, *he could not be convicted of a crime which involves wilful and unlawful intent;* even if such advice *were an inaccurate construction of the law.*"

This Court has defined a conspiracy to be "The combination of minds in an unlawful purpose" (United States vs. Hirsch, 100 U. S. 33, and in Pettibone vs. United States, 148 U. S. 197) "a combination between two or more persons by con-

certed action to accomplish a criminal or unlawful purpose."

"In all cases where a conspiracy is charged it is indispensable that in some way the existence of the alleged combination or agreement should be established by the testimony beyond a reasonable doubt. In Union Pacific vs. United States, 173 Fed. 740, the Circuit Court of Appeals said: 'Evidence of facts *that are as consistent with innocence as with guilt is not sufficient to sustain a conviction.* Unless there is *substantial evidence* of facts which *exclude every other hypothesis but that of guilt,* it is the duty of the trial court to instruct the jury to return a verdict for the accused.'"

Prettyman vs. U. S. (C. C. A), 180 Fed 43.

11. The claim that a law is unconstitutional is no ground for an *injunction preventing its enforcement* when there are *other remedies.*

Cruickshank vs. Bidwell, 176 U. S. 73.

It is well settled that injunctions in such cases are only issued to protect property rights, and drafted men were *not hurt until they were arrested for not obeying the call* and then they had plain, speedy and adequate remedy in the writ of *habeas corpus.*

12. It does not require the citation of any authorities to show that the objects and purposes of the corporation were lawful as permitted by the laws of the State of California and so adjudged by the Secretary of State when he issued the charter on the articles of incorporation specifying those objects and purposes July 14, 1917. In fact, the record shows this was admitted.

13. The overwhelming evidence is that the agreement, understanding, conspiracy and the objects and purposes of the defendants in forming, organizing, the corporation, and carrying on its work was for the purpose of testing the constitutionality of the draft

act, selective service law, in the courts of the United States, carrying it to the Supreme Court of the United States, which they calculated would decide the point in January or February, 1918, which was before any considerable number of troops were sent to Europe. These being lawful objects and purposes, IT WAS NOT THE CONSPIRACY CHARGED IN EITHER COUNT OF THE INDICTMENT, it was not and could not be a crime, and THEREFORE THE EVIDENCE DOES NOT EXCLUDE EVERY OTHER HYPOTHESIS OR CONCLUSION THAN THAT OF GUILT.

14. Those purposes and objects were the ONLY common design, or agreement and understanding *according to all the evidence. There was no evidence of any other.*

15. If anything was said or done which was a fresh and independent product of the mind of the conspirators outside of, or foreign to, that common design, it is not admissible against others and the conspirators are not liable therefor.

Williams vs. State, 81 Ala. 1, 60 Am. Rep. 133;
Lyons vs. State, 30 Tex. App. 642; 8 Cyc. 642.

16. Accidental results, not reasonably foreseen to occur and probably happen in the execution agreed upon, form no part of the conspiracy and the conspirators are not liable therefor.

Myers vs. State (Fla. 1901), 31 So. 275.

17. The individual alone, and not the corporation, or members of the corporation, is liable for such acts, or declarations, or results.

Handley vs. State, 115 Ga. 584.

18. It appears plainly that only things done to carry out the OBJECTS AND PURPOSES OF THE CORPORATION COULD BE IN PURSUANCE of the conspiracy or understanding, or agreement AS PROVED, and therefore neither of the conspiracies

alleged in each count of the indictment was proved and the District Court should have granted the motion, quashed the indictment and directed an acquittal.

POINT VII.

There was *no evidence* that any of the four alleged overt acts were done *"in pursuance of said conspiracy and to effect and accomplish the objects thereof,"* as alleged in either count of the indictment.

It is too plain to argue, that they were in pursuance of the objects of the corporation to test the constitutionality of the draft act from the first proceeding, and to raise the funds to pay the expenses of the legal proceedings.

POINT VIII.

There was *no evidence* that anything said, or done by any of the defendants was done for any purpose or with any other intent than carrying out the expressed purposes of the corporation and raising the money to pay the expense of testing the law.

POINT IX.

Matters of mere opinion, or expressions of opinion do not come within the act.

Sandberg vs. United States, 257 Fed. 643;
Slider vs. United States, 257 Fed. 620;

POINT X.

There was *no evidence* that the defendants with a knowledge of the facts which constitute a failure to comply with the law with a determination with an evil intent to wilfully obstruct the recruiting or enlistment service of the United States to the injury of the United States.

U. S. vs. Bennett, 65 Fed. 62;
Stelton vs. United States, 96 U. S. 699;
Conrad vs. United States, 127 Fed. 798;
United States vs. Ry. Co., 178 Fed. 19.

There was *no evidence* that:

1. Defendants conspired to induce and persuade them to file *false claims of exemption* from said military service.

2. Defendants conspired to induce and persuade them *to refuse and fail to appear* when called for military service under said act, rules and regulations.

3. Defendants conspired to induce and persuade them to make and cause to be made false statements and certificates as to their liability for military service under the provisions of the Act of May 18, 1917, selective service law.

4. Defendants conspired to aid, abet, counsel, and induce the said persons who were liable for military service under the draft act to evade the requirements of the said act, rules and regulations.

POINT XI.

The District Court having made the good faith of the defendants an issue in its various rulings and admitted evidence on the ground that it intended to prove bad faith and a different purpose from what appeared on the face, it erred in sustaining the objections of Wal. J. Tuska.

"If the question is in proper form and clearly admits of an answer relevant to the issues and favorable to the party on whose side the witness is called, it will be error to exclude it. Of course, the court, in its discretion, or on motion, may require the party, in whose behalf the question is put, to state the facts proposed to be proved by the answer. But if that be not done, the rejection of the answer will be deemed error or not, according as the question, upon its face, if proper in form, may or may not clearly admit of an answer favorable to the party in whose behalf it is propounded."

Buckstaff vs. Russell, 151 U. S. 637.

The questions asked of the witness Wal J. Tuska would have admitted of answers showing well founded belief that the draft law was unconstitutional, and that he was advised that the methods pursued were the best methods and perfectly legal methods of raising money to test it in the courts *and that the only intent and purpose in pursuing those methods were to raise those funds and not to obstruct* the operation of the Draft Act.

POINT XII.

The District Court committed the following *plain errors* in the charge to the jury, which errors in the charge to the jury are sufficiently assigned in the "Amended Assignment of Errors", and the portions complained of as directing a verdict of guilty were given at a time when "reason is disturbed, passions excited and prejudices are necessarily called into play," (Hickory vs. United States, 160 U. S., page 425,) and are sufficient grounds in themselves for reversal, in that:

1. The District Judge *did not leave the facts in unequivocal terms* to the judgment of the jury.

> "It is beyond the power of a court to instruct a jury to return a verdict of guilty in a criminal case, either directly *or indirectly* by the use of language which *amounts* to a direction of a verdict. * * * Juries are composed of men of average intelligence, *who have to depend upon the court for guidance in the pursuance of their duties. Every word that falls from the lips of the trial judge is accepted, and under all ordinary circumstances acted upon, by the jury.* * * * The instruction in the present case constitutes reversible error. It is not a case of the court summing up an issue of fact, and charging the jury that if they find certain facts to be true, they should find the accused guilty; and then summing

up the facts *upon the other side*, and charging that, if they should find those facts to be true, they should acquit the accused. No question of fact was here submitted to the jury. The court stated that no issue of fact existed, and, applying the law to the facts *thus found by the court to be* established, declared that the defendants were guilty, and instructed the jury that it ought so to find. Indeed, the instruction was so explicit that the jury would have been justified in regarding it as a direct violation of the mandate of the court had it returned a verdict of not guilty. The trial judge 'should take care to separate the law from the facts, and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province. It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, *and that his slightest word or intimation is received with deference AND MAY PROVE CONTROLLING.'* Starr vs. United States, 153 U. S. 614, 625, 626".

Masters vs. United States, 42 App. Cas. (D. C.) 350;

American Ann. Cas., 1916 A. 1243;

Breese vs. United States, 48 C. C. A. 36; 108 Fed. 804.

2. The District Court failed to perform "its duty to tell the jury by what principles of law they should be guided, in the event they found the facts to be as stated by the accused."

Beard vs. United States, 158 U. S. 554.

3. It did not tell the jury that the defendants had a legal right to do what they were doing and that if they had reasonable grounds to believe and did in good faith believe that the draft act was unconstitutional and that acts done in pursuance of that belief for the

purpose of testing the act in the courts could not be criminal and the defendants were not responsible for incidental effects on the minds of others.

Beard vs. United States, 158 U. S. 564.

4. The District Court should have instructed the jury that the defendants had a perfect *legal right* to question the constitutionality of the draft act. If they had reasons to believe that it was unconstitutional and in good faith so believed, then it was their *duty* in conformity with their oath to support and maintain the Constitution of the United States, to question that constitutionality in the courts, carrying the question to the Supreme Court of the United States for final decision, if they were able to carry it that far. If having determined to carry it to the Supreme Court of the United States for such final determination, anything that they said and did, for the accomplishment of *that purpose,* and with the *intent* to accomplish *that purpose,* and for the purpose of raising the funds for that purpose, was entirely lawful and could not be prevented by any Act of Congress. Any agreement or understanding to form a corporation and contribute and collect money, and secure assistance *to accomplish that purpose,* could not by any Act of Congress, or otherwise, constitute a criminal conspiracy, or a conspiracy to commit an offense against the United States.

Beard vs. United States, 158 U. S. 564;
Bird vs. United States, 180 U. S. 362;
Allison vs. United States, 160 U. S. 212.

5. The District Court should have instructed the jury that whatever *incidental effect,* anything said, written, or done, in endeavoring to accomplish *that purpose,* might have on the minds of others *could not make criminal* what was so said, written or done, *with the intent to accomplish that purpose.*

6. The District Court should have instructed the

jury that if something objectionable, offensive, or even constituting a crime, was said or written or done by one or more of the members during their activities to accomplish that purpose, it would not make the previous agreement, understanding or conspiracy criminal.

7. It picked out certain evidence against the defendants and emphasized it.

Allison vs. United States, 160 U. S. 203;
Williams vs. United States, 158 Fed. 30;
Hibbard vs. United States, 172 Fed. 66;
Mills vs. United States, 164 U. S. 644;
Reagan vs. United States, 157 U. S. 301;
Hicks vs. United States, 150 U. S. 442.

8. It conveyed the implication of guilt to the jury.

Hickory vs. United States, 160 U. S. 425.

9. It in effect eliminating from the defense the evidence of good faith and want of criminal intent offered by the defendants which could not be cured by any general remarks that he did not intend to influence them.

Sandals vs. United States, 213 Fed. 569.

10. The jury must have supposed that in the opinion of the court there was evidence showing guilt, and showing an agreement, and the guilty purpose and intent charged, although there was no foundation in the evidence for the intimations or statements.

Beard vs. United States, 158 U. S., pages 558, 559, 560.

11. The court committed error when *in effect* it told the jury, by different forms of expression that there was sufficient evidence to convict, that under the law they were guilty, and that if they found to be the undisputed facts as they were undisputed the defendants were guilty.

Beard vs. United States, 158 U. S. 559;
Hickory vs. United States, 160 U. S. 423.

12. It ignored the evidence of the defendants.

Rudd vs. United States, 173 Fed. 912;
Mullen vs. United States, 106 Fed. 892;
Breese vs. United States, 108 Fed. 804;
Stewart vs. United States, 211 Fed. 41;
Stair vs. United States, 153 U. S. 614.

13. There was no reference to the defendants' evidence.

Bird vs. United States, 180 U. S. 362;
Thompson vs. United States, 155 U. S. 271, 281;
Hickory vs. United States, 160 U. S. 408, 422, 423;
Cornelius vs. Com., 15 B. Mow. (Ry.) 539.

13. It assumed there was no evidence in favor of the defense on those points.

Dolan vs. United States.

POINT XIII.

The punishment being different for each count, evidence having been offered on both counts which was insufficient to support one or either of the two counts and the general verdict of guilty makes it impossible to say on which count they were convicted, and there must be a new trial.

People vs. Mitchell, 92 Cal. 590;
People vs. Garnett, 129 Cal. 365;
People vs. Lee, 94 Cal. 386;
People vs. Eppinger, 109 Cal. 297.

Wherefore the plaintiffs in error pray that the judgment be reversed.

DANIEL O'CONNELL,
Carl J. F. Wacker, *pro sese.*

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Supreme Court of the United States

OCTOBER TERM—1919.

No. 221.

DANIEL O'CONNELL et al.,
Plaintiffs-in-Error,
against
UNITED STATES OF AMERICA,
Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR PLAINTIFFS-IN-ERROR, DANIEL O'CONNELL, and CARL J. F. WACHER.

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INDEX.

PAGES

Statement of Case 1-12

Questions Involved 8
Condition of the Record 10

Specification of Errors 13 38

Argument 38-69

Point I.

The Verdict is Fatally Defective 38

Point II.

The Court Erred in Refusing to Direct a Verdict of Not Guilty at the Conclusion of all the Evidence on the Ground that the Conspiracy Charged in the Indictment Had Not Been Proved 43

Point III.

The Court Erred in Admission of Evidence 57

Point IV.

The Learned Trial Judge Erred in His Charge to the Jury 58

PAGE

Appendix 70-83

U. S. Exhibit 1, Legal Opinion and Advice on Conscription Law 70
U. S. Exhibit 2, Circular Letter of the "American Patriots" 72
U. S. Exhibit 3, Articles of Incorporation of "American Patriots" 74
Exemption Claim 76
U. S. Exhibit 13, Advertisement of July 3rd Meeting 80
U. S. Exhibit 14, Speech of Herman B. Smith 81
U. S. Exhibit 16, Proclamation and War Program of the Socialist Party 82

AUTHORITIES CITED

	PAGE
Abrams vs. U. S., 40 Sup. Ct. Reporter, 17..	45
Allison vs. U. S., 160 U. S., 203	58
Beard vs. U. S., 158 U. S., 554	58
Bird vs. U. S., 180 U. S., 356	58
Brown vs. U. S., 150 U. S., 93, 98	44
Campbell vs. Regina, 11 Adolph & Ellis (N. S.) Q. B., 799	39
Clyatt vs. U. S., 197 U. S., 207	40
Crawford vs. U. S., 212 U. S., 183	40
Day vs. People, 76 Ill, 380	39
Debs vs. U. S., 249 U. S., 211	58
Espionage Law, Title I, Sec., 3	2
Garland vs. Davis, 4 How., 131	39
Gillette vs. U. S., 236 Fed. Rep., 215, 218 ...	41
Greenleaf on Evidence (16th Ed.,) Sec., 94...	44
Hickory vs. U. S., 160 U. S., 408	58
Holmes vs. State, 58 Neb., 297	39
Holmes vs. U. S., 182 Fed. Rep., 485, 486 ...	41
Jones on Evidence Sec., 254	44
Langford vs. State, 130 Ala., 74	44
Logan vs. U. S., 144 U. S., 263, 309	44
Masses Publishing Co. vs. Patten, 244 Fed. Rep., 535	65
Masses Publishing Co. vs. Patten, 246 Fed. Rep., 24	65
Morse vs. U. S., 174 Fed. Rep., 539	41
Oppenheim vs. U. S., 241 Fed. Rep., 625, 628	41, 63
Patterson vs. U. S., 2 Wheat, 221	39
Pettibone vs. U. S., 148 U. S., 197, 203.....	43
Pettine vs. Territory of New Mexico, 201 Fed. Rep., 489, 497	41
Scott vs. State, 4 Okla., Cr. Rep., 70.....	39

PAGE

Selective Service Law, Sec., 6 3
Simmons vs. U. S., 142 U. S., 148 42
Sparf and Hansen vs. U. S., 156 U. S., 51 .. 58
State vs. King, 194 Mo., 474 39
State vs. Snyder, 32 Wash., 299 39
Supreme Court Rule, 35 Subd., 1 14
Taylor vs. U. S., 244 Fed. Rep., 321, 324..... 41
Thompson vs. U. S., 155 U. S., 271 58
Union Pacific Coal Co. vs. U. S., 173 Fed. Rep., 737 44
U. S. vs. Baker et al., 247 Fed. Rep., 124..... 63
U. S. vs. Eastman et al., U. S. District Court, So. District of New York, April 25, 1918, unreported 63
U. S. vs. Hirsch, 100 U. S., 33 43
U. S. vs. Perz, 9 Wheat., 579 42
Weems vs. U. S., 217 U. S., 349 40
Wiborg vs. U. S., 163 U. S., 632 40
Williams vs. U. S., 158 Fed. Rep., 30, 36 40
Winchester vs. Creary, 116 U. S., 161..... 44

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 221.

DANIEL O'CONNELL, DAVID J. SMITH, HERMAN B. SMITH, CARL J. F. WACHER, THOMAS CAREY, AND E. R. HOFFMAN,
Plaintiffs-in-Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Brief for Plaintiffs-in-Error Daniel O'Connell and Carl J. F. Wacher.

Statement of Case.

On September 7, 1917, an indictment containing two counts was returned against all of the

above plaintiffs in error, defendants below, in the United States District Court, for the Southern Division of the Northern District of California. The first count of the indictment charges that defendants unlawfully conspired to obstruct the recruiting and enlistment service of the United States by conspiring (a) to persuade men between twenty-one and forty years of age not to enlist; (b) to refuse to register or be registered for military service; (c) to file false claims for exemption; (d) to refuse to take the physical examination; and (e) to refuse to appear when called for military service. The indictment charges that the conspiracy was formed on *June* 16, 1917, and was continuous thereafter. This count was apparently intended to charge a conspiracy to violate that portion of Section 3 of Title I of the Act of June 15, 1917 (commonly known as the Espionage Law) which reads as follows:

> "Whoever, when the United States is at war * * * shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

The second count of the indictment charges that defendants unlawfully conspired (a) to make and cause to be made false statements and certificates as to their liability and the liability of William Mettler, Jacob M. Hershman, Henry Christman, John Murphy, Harry Ungar, Reuben Ungar, and divers other persons, whose names are unknown,

for military service under the provision of the Act of May 18, 1917; (b) to evade the requirements of the above mentioned Act; (c) to aid, abet, counsel and induce the said persons to refuse and fail to present themselves for physical examination required under provisions of the act; (d) to aid, abet, counsel and induce said persons to fail and refuse to report for military service when called; (e) to fail and refuse to do and perform any of the things required of them under the said act, rules and regulations. The conspiracy attempted to be alleged under the second count of the indictment is charged to have commenced on the 1*st day of June,* 1917, and to have been continuous thereafter. The second count of the indictment was apparently intended to charge a conspiracy to violate that portion of Section 6 of the Act of May 18, 1917, known as the "Selective Service Act," which reads as follows:

> " * * * any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this act, or regulations made by the President thereunder, or otherwise evades or aids another to evade the requirements of this act or of said regulations, or who, in any manner, shall fail or neglect fully to perform any duty required of him in the execution of this act, shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, or,

> if subject to military law, shall be tried by court-martial and suffer such punishment as a court-martial may direct."

The overt acts charged to have been done in pursuance of the conspiracy were the same in both counts, to-wit: (1) That defendants O'Connell, David J. Smith and Herman B. Smith, at San Francisco, in said district on the 12th day of July, 1917, caused to be incorporated an association known as the "American Patriots"; (2) that defendant Thomas Carey, at San Francisco, in said district, on the 4th day of August, 1917, filed a claim of exemption which contained the following language:

> "I am certain that notwithstanding the humbug and lies published in the newspapers and other publications of the world, there is not, and cannot be, the slightest danger to the United States, as this war is simply a war of aggression, conquest, and greed on the part of England and England and her agents have secured a vote of Congress assisting them in this war, which vote was in violation of the Constitution and will be reconsidered by the next Congress who will have full power and express directions from the people."

It is not charged that the above statements were false or that there was otherwise any false or improper statement in the claim of exemption. (3). That defendant O'Connell on the 4th day of August, 1917, went from San Francisco to Lodi, California; (4) that on the 1st day of August, 1917, the defendant Daniel O'Connell prepared and

caused to be distributed a document entitled "Legal opinion and advice on the Conscription Law to American Patriots."

The defendants were tried together in San Francisco, and the trial lasted from the 12th to the 25th of September, 1917, inclusive. The District Attorney prior to trial dismissed the action against one of the defendants named in the indictment, William C. Mengedoth (page 33). The jury returned the following verdict, found on pages 31-32 of the record:

> "We, the jury, find Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacker, Thomas Carey and E. R. Hoffman the defendants at the bar, guilty on the———count of the indictment and———on the———count of the indictment.
>
> THOMAS H. HOSKINS,
> Foreman."

(Endorsed:) "Filed Sept. 25, 1917, at 6 o'clock and 35 minutes P. M. W. B. Maling, Clerk, by Lyle S. Morris, Deputy Clerk."

There was no other verdict or finding of the jury in the case except the foregoing. Upon this verdict the defendants were adjudged guilty and sentenced as follows: Daniel O'Connell to imprisonment in the United States Penitentiary at McNeil Island, Washington, for the period of five (5) years on the first count of the indictment and for the period of two (2) years on the second count of the indictment, said terms of imprisonment to run *consecutively;* defendant E. R. Hoffman to imprisonment in the United States Penitentiary at McNeil Island, Washington, for the period of two (2) years on

the second count of the indictment and for the period of three (3) years on the first count of the indictment, said terms of imprisonment to run concurrently; the defendant Thomas Carey to imprisonment in the United States Penitentiary at McNeil Island, Washington, for the period of two (2) years on the first count of the indictment and for the period of two years on the second count of the indictment, said terms of imprisonment to run concurrently; defendant Carl J. F. Wacher, to imprisonment in the United States Penitentiary at McNeil Island, Washington, for the period of eighteen (18) months on the first count of the indictment and for the period of eighteen (18) months on the second count of the indictment, said terms of imprisonment to run concurrently, and to pay a fine in the sum of Two hundred fifty ($250.) Dollars, in default of the payment thereof, to be further imprisoned until said fine be paid or he be otherwise discharged by due course of law; and defendants David J. Smith and Herman B. Smith, to imprisonment in the County Jail of the County of San Francisco, State of California, for the period of one (1) year on each count of the indictment, said terms of imprisonment to run concurrently as to each of the said defendants David J. Smith and Herman B. Smith (page 194).

Defendant O'Connell tried the case on behalf of himself and his co-defendants.

The defendants are all native-born American citizens except the defendant, Carey (page 164), who is Irish and had been a citizen for three years prior to trial and so far as his record shows none of them have ever been accused of any crime or wrong-doing prior to the finding of the present indictment. The defendant, O'Connell, is a lawyer

and has practiced law in California and been a resident of San Francisco for some years past. E. R. Hoffman is a physician, born in California, is above draft age and has resided and practiced his profession in San Francisco most of his life (page 131). The Smith brothers are Socialists and are active supporters of the Socialist Party (pages 145, 156). David J. Smith was but 19 years of age at the time of the trial (page 142) and Herman B. Smith became 21 years of age (page 149) on July 11th, 1917. Defendant Carey was within draft age and registered for the draft, took the medical examination and joined the American Patriots in order to test the constitutionality of the draft act (page 162). Defendant, Carl J. F. Wacher was also within draft age, registered for the draft, took the medical examination and joined the American Patriots to test the constitutionality of the law (pages 114, 116) and later became the secretary of the organization known as the "American Patriots" (page 118).

It appears that after the passage of the Selective Service Act of May 18, 1917, defendant O'Connell, was consulted by numerous clients as to the constitutionality of the act and advised that in his opinion the act was unconstitutional, particularly if construed to authorize the drafting of men for service in foreign lands (pages 124-126). He never advised any one not to obey the law but only advised in the case of those who had already decided to test its constitutionality what steps were necessary for that purpose. It appears that the parties consulting O'Connell on the subject were of small means and not able singly to meet the large expense which would be involved in present-

ing the constitutional questions to this court and to employ the eminent counsel desired to argue those questions (pages 122, 125). So it was decided to organize a membership corporation under the California law for the purpose of contesting the law and raising the necessary money from membership fees and dues for that purpose (page 126). It was not an unusual practice in California to organize corporations for the purpose of testing the validity of laws (page 131). Such a corporation was formed on the 14th day of July, 1917; its purposes were duly approved by the Secretary of State as required by law and from time to time a number of people joined the corporation and paid their dues. The purposes of the corporation were advertised at public meetings and speeches and by placards (pages 40, 112). A description of the activities of defendants and others in advertising this corporation and securing members and raising money for the purpose above-mentioned, constitutes a large portion of the evidence in this case. In addition to this evidence there was other very prejudicial proof of extraneous events admitted against defendants which will be referred to later and which occurred prior to the time that any combination or undertaking for any purpose was shown to exist between any of the defendants.

Questions Involved.

The questions involved briefly stated are whether the indictment states facts sufficient to constitute a crime; whether sufficient evidence of defendants' guilt was presented to warrant conviction; whether the verdict of the jury sustains the

judgment of guilty and sentences pronounced thereon; and various rulings of the trial court in the admission and rejection of evidence and the giving of certain instructions. The sufficiency of the indictment was raised by formal written demurrer which was overruled prior to the trial (page 16); the grounds whereof were reasserted in the motion to dismiss at the conclusion of the prosecution's case (pages 21-26) and again at the conclusion of all the evidence (page 30) and exceptions were duly taken to the order of the court overruling the demurrer (pages 16, 33) and denying the said motions (pages 94, 172). The question whether sufficient evidence of defendants' guilt was presented to warrant a conviction was raised at the conclusion of the prosecution's case by a motion to dismiss (pages 94-99) and at the conclusion of the whole case by a motion to direct a verdict of "not guilty" (page 30) and to the order of the court denying each of said motions exceptions were duly taken (pages 94, 172). The rulings of the court in admitting and rejecting evidence as well as in giving certain instructions are presented by objections and exceptions which will be fully set forth under the specifications of error hereinafter following. The constitutionality of the Draft Act of May 18, 1917, and of the Espionage Law of June 15, 1917, respectively, was challenged by the demurrer to the indictment (pages 6-15) and by the motion to dismiss at the conclusion of the prosecution's case (pages 21-26), and again at the conclusion of all the evidence (page 30) and exceptions were duly taken to each of the rulings of the court sustaining the constitutionality of said acts and error was duly assigned on each of

the above-mentioned rulings in the original assignment of errors duly filed (pages 195-198) and the motion in arrest of judgment was made upon all the said grounds (pages 190-191). The insufficiency of the verdict to support the judgment appears on the face of the record and the question was raised in the amended assignment of errors hereinafter mentioned.

Condition of the Record.

The condition of the record calls for a word of explanation. Substantially all the original exhibits of both sides, by stipulation of the parties and order of the District Court were transmitted by the clerk of the District Court to this court to be deemed and considered a part of the bill of exceptions with the same effect as though physically incorporated therein (pages 199-200). By reason of the practice thus adopted, the exhibits are not printed in the transcript of the record and the more material exhibits of the prosecutions we have printed as an appendix to this brief and preserved the exhibit letters and numbers used in the trial court.

The defendants after obtaining several extensions for filing the bill of exceptions duly filed their proposed bill on December 31st, 1917 (page 176). The Government thereafter procured various extensions of time within which to file proposed amendments and filed the same within the additional time so procured for that purpose (see Certificate to Bill of Exceptions, page 176). It appears that the amendments proposed by the Government were three hundred and fifty-seven in

number, and many of which proposed striking out large portions of the proposed bill of exceptions including large parts of the evidence and the material portions of the judge's charge. This motion was granted by the trial court and thereafter the plaintiffs in error applied to this court for a writ of mandamus to compel the said District Court to settle and sign a supplemental bill of exceptions containing the matter so stricken out. That motion was denied by this court on or about January 7th, 1919. Thereafter, the plaintiffs in error applied to this court for a writ of certiorari to the said District Court directing it to certify to this court certain portions of the evidence, rulings and charge of the said District Court so stricken from the bill of exceptions as above stated, which were deemed absolutely essential to the presentation in this court of the case of the plaintiffs in error. That motion was granted by this court on June 9, 1919, and the following order, omitting the title of the case, was entered:

> "ON CONSIDERATION of the motion for a writ of certiorari on suggestion of diminution of the record herein.
>
> IT IS NOW HERE ORDERED BY THE COURT that the said motion be, and the same is hereby granted, without prejudice, the matter submitted with the motion to stand as a return to the writ. June 9, 1919."

The facts here stated respecting the Government's proposed amendments to defendants' bill of exceptions and the order of the District Court

allowing said amendments and striking out the larger portion of said bill are taken from the record on the motion for the writ of certiorari herein. It appears, however, from the main transcript of record that portions thereof are omitted and the material for that reason as arranged in the printed transcript in several instances is obviously disconnected (see pages 74, 147, 172). Where necessary in this brief to refer to the matter contained in the certiorari record, which, pursuant to the above order, we treat as correct and as a sufficient return to the writ, we will refer to the appropriate page of that record, distinguishing it by the letter "C" following the page number from the main transcript of record. The bill of exceptions as duly certified on the 16th day of September 1918, by the trial justice (see page 188) does not contain the matter set forth in the certiorari record, but the two must be read together to understand the questions presented.

A further motion was duly made to this court by the plaintiffs in error for leave to file an amended assignment of errors herein and coming duly on to be heard, this court made an order on or about June 9, 1919, that the decision on said motion should await the argument and decision on the merits. We take it that the record on this last mentioned motion will also be before the court on the argument on the merits and where we have occasion to refer in this brief to the amended assignment of errors, we will designate the appropriate page in this last mentioned record.

Specification of Errors.

We shall urge errors committed by the learned trial court to the prejudice of the defendants as follows:

FIRST.—The verdict is insufficient to sustain the judgment and sentences pronounced thereon.

The record as to what occurred when the jurors returned into court with their verdict is as follows:

> "* * * upon being called all twelve (12) jurors answered to their names and were found to be present and in answer to question of the court, stated that they had agreed upon a verdict and presented a written verdict, which the court ordered filed and recorded, to-wit:
>
> 'We, the jury, find Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacker, Thomas Carey and E. R. Hoffman the defendants at the bar, guilty on the———count of the indictment and———on the———count of the indictment.
>
> THOMAS H. HASKINS, Foreman.'"

The jurors were thereupon excused by the court. The verdict is endorsed: "Filed Sept. 25, 1917, at 6 o'clock and 35 minutes P. M. W. B. Maling, Clerk, by Lyle S. Morris, Deputy Clerk" (pages 31-32). It does not appear that the verdict was read or that the jurors were interrogated respecting their verdict except to say that they had agreed upon a verdict. The defendants, in their motion in arrest of judgment, urged that "because of

which said errors in the record herein no lawful judgment can be rendered by the court upon the record in this cause" (page 191). In the amended assignment of errors, it is specifically claimed that no judgment can be entered because of the insufficiency of the verdict (page 5, Assignment of Errors record). The error in entering judgment and sentencing the defendants upon this verdict is so plain and so vital that we urge the court to exercise its power under Rule 35, Subdivision 1 and to consider it even though it should be found that there was no sufficient assignment of error covering the point. We do this the more readily because in the case of O'Connell, he received the maximum sentence under count two of the indictment and five years under count one, the sentences to run consecutively (page 194 of the record).

SECOND.—The court erred in refusing to direct a verdict of "not guilty" at the conclusion of all the evidence on the ground that there was no proof of conspiracy and that the offense charged in either count of the indictment had not been proved.

(This motion is set out at page 30 of the record and the exception, No. 29, appears at page 172). Substantially the same motion was made upon the above and many other grounds at the conclusion of the prosecution's case and exception duly taken (pages 94-99) and the same questions were again raised on the motion in arrest of judgment (page 191), and error duly assigned on the ruling in original assignment of errors (page 198). A statement of the facts of the case will be presented later in the brief.

THIRD.—The court erred in overruling the defendants' objection to the admission in evidence of the dodger advertising the Dreamland Rink meeting of July 3, 1917 (U. S. Exhibit 13, page 47), and in refusing at the close of the prosecution's case to strike it out.

On *July* 3, 1917, a public meeting was held in Dreamland Rink, San Francisco. About six thousand persons were present. At that meeting defendant Herman B. Smith made a speech and presented a petition which was adopted by a rising vote by those present at the meeting (page 150). The petition, the substance of which appears in the record (page 49) was addressed to the Congress of the United States and prayed the Congress (1) to prohibit the use of our land and naval forces for the purpose of conquest, (2) to submit to a referendum vote a proposition to repeal the draft law, (3) to finance the war by appropriating incomes in excess of Ten thousand Dollars for that purpose, (4) to declare the purpose and objects of the war, (5) to nationalize the great industries of the country and to deal with the workers through their own governing bodies, also to grant universal suffrage, the initiative and referendum, substantially as they exist in the State of California. This meeting was advertised by a hand bill or dodger calling upon the American people to defend their liberties at home. This dodger is "U. S. Exhibit No. 13", also record page 47. At that meeting, defendant Herman B. Smith made a speech which was introduced in evidence by the prosecution and appears as "U. S. Exhibit No. 14." Objection was duly made by the defendants to the introduction of the dodger in evidence on the ground that no foundation was

laid for its introduction and that none of the defendants had anything to do with it other than Herman B. Smith (47). The same objection and ruling were made concerning the speech Smith delivered and the same exception taken (pages 47-48). At that time there was no thought of organizing the American Patriots (pages 155-160) and the organization referred to by defendant Herman B. Smith in his speech was not the American Patriots, and the speech was made largely in behalf of the rights of the conscientious objector (pages 155-156) Defendant O'Connell met Herman B. Smith for the first time on the day of the meeting, was invited to speak at the meeting but declined to do so on the ground that he was going out of town. Defendant Wacher had known the Smith brothers some years previous and merely said "hello" when they met by chance at the meeting (page 150). Some of the newspapers of San Francisco having raised objection to the holding of the meeting, the defendant Herman B. Smith issued and caused to be published a statement in two of the leading newspapers in the City to the effect that the meeting did not contemplate anything illegal or resistance to any law, but was merely for the purpose of submitting to the audience a petition which, if adopted, was to be presented to Congress. And defendant O'Connell, when the purpose of the meeting was submitted to him, gave it as his opinion that it was proper and lawful to hold the meeting. A copy of the petition was sent to the President, to the Congress and to some members of the House and Senate, eight copies in all being sent to the President and members of the Congress (page 150). It affirmatively appears, that there was no thought or purpose on the part of defendants to organize the

American Patriots until a week or ten days after this meeting (page 160).

A subsequent motion was made at the conclusion of the prosecution's case (page 89) to strike out the evidence relating to this meeting which would also include this dodger and was denied by the court and exception duly taken (page 90; also page 94).

FOURTH.—The court erred in overruling the defendants' objection to the admission in evidence of the transcript of Herman B. Smith's speech (U. S. Exhibit No. 14) made at the Dreamland Rink meeting on July 3, 1917 (pages 47-48). Objection was duly made to the admission of this speech in evidence upon the grounds mentioned in the previous specification of error, the objection overruled and exception taken (pages 47-48).

FIFTH.—The court erred in denying the defendants' motion made at the conclusion of the prosecution's case to strike out the evidence of the speech above mentioned upon the ground that it had not been connected with the other defendants and was prior to any alleged conspiracy, and was moreover lawful under the Constitution of the State of California (pages 89-90).

SIXTH.—The court erred in denying defendants' motion made at the close of the government's case to strike out the printed copies of the Socialist platform adopted at St. Louis in April, 1917, and sent from there direct to the voters throughout the country belonging to the Socialist Party.

On *June* 3, 1917, the Socialist Party held a meeting at Moose Hall, San Francisco (page 144). It

does not appear that any of the defendants are Socialists except the brothers, David J. and Herman B. Smith (pages 145, 156). It does not appear that any of the defendants except the Smith brothers had anything to do with the meeting and the record does not show that any of the others ever heard of the meeting prior to the trial. In preparation for the meeting a large quantity of pamphlets of the platform of the Socialist Party adopted at St. Louis, in April 1917, were taken by David J. Smith to a hotel near the place of meeting, the day previous, to be called for the night of the meeting, in order that they might be distributed to those present at the meeting. At the time of the meeting the hotel proprietor was away and in consequence of his absence, the pamphlets could not be found when they were sent for to be used at the meeting (page 144). Two days later, the pamphlets were seized by an agent of the Department of Justice, without warrant, and were introduced in evidence and read to the jury (page 52). This was more than a month before the evidence tends to show any understanding between any of the defendants for any purpose and before the defendants O'Connell and the Smith brothers became acquainted. This Socialist platform is marked "U. S. Exhibit 16," and the material portions of it are printed in the appendix of this brief. While it may have been within the discretion of the trial court to admit this pamphlet in evidence on the theory that the prosecution would connect it, the prosecution in fact never did connect it, nor attempt to do so, and the court at the conclusion of the prosecution's case, refused to strike it out, to which rul-

ing the defendants duly excepted (pages 88-89). The only possible purpose of the prosecution in laying the conspiracy set forth in the second count of the indictment as far back as June 1st was to enable it to get this damaging evidence before the jury.

We call attention particularly to the language of the court used in the presence of the jury in overruling the motion to strike out this document and to the colloquy between the court and counsel, found at pages 88-89, as follows:

> "It might be literature produced by an organization in Europe as to which the defendants so far as they were concerned had never had any knowledge as to its organization, much less being members of it, and yet if they availed themselves of the emanations from a source of that kind, which by reason of its character was calculated to further their ends, if they were using it and disseminating it, *or were on the point of doing so,* it is entirely competent as evidence in view of the nature of this charge. *The evidence in this case it seems to me does sufficiently disclose this to enable it to go to the jury.* I do not pass upon the weight of the evidence at all, I pass upon its admissibility, its relevance to the issue, and I am bound to leave the weight that it shall be accorded in the great sum of evidence, to the jury; but it seems to me that under the evidence in this case, if there be found, and I think there was read matter from this exhibit which, as I suggested a moment ago might be, or would be calculated to influence the minds

of people to whom it was distributed, which would induce them, if responsible to this draft act, to refuse to conform to it and so far as lay in their power to resist its execution, I don't see why it would not be admissible.

Mr. O'Connell: *If it is connected,* if your Honor please.

The Court: *That is just what I have passed upon. I think the evidence here is sufficient to connect it.* One of the defendants, it was very clearly shown,—I am talking about what the evidence tends to show, because the jury will find out whether it is shown, but if it—[is] not shown to their satisfaction that he had to do with it, then of course they will disregard it; but for the purposes of a motion of this kind, if there is evidence which tends to show that one of the defendants *during the existence of the conspiracy,* if the jury shall find that one was in existence, had to do with the literature of this kind for the purpose of aiding or assisting in its distribution, *or independently for himself,* distributed it and it was of a character that might further the purposes alleged to have been the object of the conspiracy, it is perfectly competent.

Mr. O'Connell. *My objection, of course, was that it had not been connected.*

The Court: Just recall the evidence on the subject. The hotel keeper testified to facts which if the jury believes it, would be sufficient to connect the defendant David J. Smith with this literature. *That makes it competent to go before the jury for their consideration.* I will overrule that motion and give you the benefit of an exception."

The judge here ruled and stated, in the presence of the jury, as plainly as possible, that there was evidence in the case from which they could find that the conspiracy alleged in the indictment existed between the defendants as early as June 2, 1917. There is not a scintilla of evidence in the record to support such ruling and decision of the learned trial court.

SEVENTH.—The court erred in admitting in evidence the demurrers and other proceedings in the actions of U. S. vs. Samuel Cohen, and U. S. vs. Vittorio Gambo, charging them with violation of the Selective Service Act in that they had failed to register.

These indictments had been returned on the 19th day of June, 1917. The demurrers thereto which were in the same form as the demurrers interposed in the present case by the same attorney, defendant O'Connell, had been overruled, defendants convicted and sentenced on the 27th day of June, 1917. This evidence was duly objected to on the ground that no proper foundation for it had been laid and that it was immaterial and incompetent (see page 6, C; also printed transcript of record, pages 74-75). Those cases had absolutely nothing to do with the case on trial. None of the defendants except O'Connell had anything to do with them or apparently ever heard of them. The ruling of the court (pages 4, 5, C), as in the case of other errors noted, assumes without a particle of evidence to support the assumption, that the defendants had formed the conspiracy alleged in the indictment as early as June, 1917, so that the acts of defendant O'Con-

nell at that time would be admissible against the other defendants. Moreover, the evidence would not have been admissible even against O'Connell personally for any legitimate purpose, and these records, read as they appear to have been by the District Attorney to the jury, involving an entirely different set of facts and circumstances from those in the case on trial, could not have been otherwise than highly prejudicial. Gambo was sentenced only to one hour in the custody of the marshall, and Cohen to thirty days in jail. They elected to serve their sentences and not appeal (pages 112, 129).

EIGHTH.—The court erred in charging the jury as follows:

> "Now, the theory upon which the Government's case proceeds is, in substance that the defendants' have transgressed the principles I have stated and have violated the law by deliberately and intentionally entering into an unlawful combination or association to thwart, interfere with, and obstruct the carrying out and enforcement of the Selective Draft Act by a course of conduct consisting of a series of acts not only intended but calculated to accomplish this unlawful purpose; that the organization of the corporation called the American Patriots was not had in good faith with any genuine purpose of testing this law, but was intended to be used merely as a means through which to secure funds for the use and benefit of those organizing it and with which to conduct a propaganda against the act, with the intent to hamper and defeat its execution

and to use the corporation as a mask or cloak for their operations, under the mistaken idea that thereby the individual members would be shielded from responsibility for their acts; that in pursuance of this purpose the defendants and others inspired by them issued and distributed pamphlets, circulars, advertisements on wagons, legal opinions and other literature, made public speeches and film presentations, and gave private advice to individuals, all of which was of a character to render it unlawful, and was designed and intended to inflame the minds of the people, and particularly those subject and eligible for military service against the propriety and validity of this act and to arouse active opposition thereto and thereby persuade and induce them to refrain from enlisting in the military service or complying with the compulsory requirements of the act, and thereby to obstruct and interfere with its execution and enforcement. If you find this theory of the Government to be sustained by the evidence, then it will be your unquestioned duty to find the defendants' guilty" (see page 172, original print; 270 transcript of record; also pages 7 and 8, C.).

This charge was erroneous among other reasons because the jury was thereby instructed to find the defendants guilty if they found the government's theory to be *sustained* by the evidence. Of course the government's theory was sustained by the evidence if the evidence preponderated ever so slightly in favor of that theory. The charge should have

stated that the jury must be satisfied beyond a reasonable doubt of defendant's guilt before they could return a verdict of guilty. Neither at this point or any other in this charge does such instruction appear to have been given the jury. The defendants offered to insert the entire charge in the bill of exceptions (page 172) and it must be presumed that the prosecution would have agreed to this if there had been anything in the omitted portions of the charge which would have cured the errors in the portions included in the bill.

NINTH.—The court erred in charging the jury as follows:

> "As I had occasion to state in your presence in passing upon the motion of the defendants for an instructed verdict, there is evidence before you which is sufficient in its legal tendency, that is sufficient as a matter of law, to sustain the government's theory; but whether it is such as to satisfy you of its truth is a question wholly for your consideration and determination, as I shall more particularly instruct you."

The said charge was erroneous in that the jury was thereby instructed that the evidence before them was sufficient as a matter of law to sustain the government's theory. The portion of the charge which left to the jury merely the question as to whether the evidence offered was true or not, emphasized the error. The jury might have found all the government's evidence to be true, for it consisted of written documents and oral declarations,

but yet have found defendants "not guilty" because they might have found that the evidence offered did not sustain the inferences which the government sought to draw from it (page 8, C.).

TENTH.—The court erred in charging the jury as follows:

> "I do not deem it necessary to review the evidence in the case at length, as is my right; you have heard it all and as I have observed with satisfaction, with a close and attentive ear. I may, therefore, leave it for your intelligent consideration, feeling full confidence that you will not overlook any of its material features and in your ability and disposition to reason only just conclusions therefrom. I should, however, notice the aspects of some of the facts which the evidence tends to establish, the tendencies of which might not otherwise be readily apprehended by the minds of laymen like yourselves; that is men not versed in the law.
>
> "Among other documents which the evidence tends to show were put out and furnished by the defendants through the American Patriots and those in its employ to people who came to its office was a so-called legal opinion admitted to have been prepared by the defendant, O'Connell, a copy of which has been put in evidence. It is in the form of questions and answers for the guidance of men seeking advice on the subject of the draft, and in it its contents these questions and answers are found:

" '2nd. Will they report to exemption or ex-'amination boards? Ans. As the boards might 'have them take the oath or sign some papers 'putting them in the military service, the safest 'way is to not go, but simply file an affidavit of 'exemption, as the best and safest way of test-'ing the law. 3rd. If they refuse to go are 'they under military law? A. No, they are 'not. 4th. Can the military authorities pro-'ceed against them? A. No. Also: If the law 'is declared constitutional, then the worst that 'can happen is that the defendants will have 'to serve a year in jail.'

"These answers do not state the law. In the rules and regulations promulgated by the President in accordance with the terms of the Selective Service Law is this: 'Each district 'board shall certify in quadruplicate forms pro-'vided by the Provost Marshal General for that 'purpose, to the Adjutant General of the State, 'Territory, or District of Columbia, as the case 'may be, the serial numbers, names, and de-'tailed addresses of all persons called by the 'local boards within the jurisdiction of such 'district board who have not been exempted or 'discharged; separate certificates shall be made 'in respect of the men called by each of the 'several local boards. Upon receipt of such ad-'dresses shown in the certificates notify each 'man whose name has been so certified that he 'has been selected for military service and shall 'order him to report for military service in 'person at a specified time and place, to be 'fixed pursuant to advices from the Adjutant 'General of the Army. From the time so speci-'fied each man to whom such notice shall have

'been so mailed shall be in the military service of the United States.' "

"This rule the President was duly empowered to make and is a perfectly valid regulation. In accordance with its terms, where a drafted man has been notified as there provided, that he has been selected for service and is ordered to report for duty, he is from that moment in the military service and subject to military law, and for a refusal to obey the order may be proceeded against by the military authorities and forcibly arrested if need be. Nor is it the law that if the act be held constitutional the worst that can happen to the person arrested for failing to report is a punishment of one year in jail. He may not only be thus punished, but may then be required to give his service in the Army. And it is not the law, as contended at the trial by defendants, that if a man reports for service in obedience to the notice to appear he then loses any right to resort to the civil courts to test the validity of his compulsory service. As I had occasion to say earlier in the trial, if he deems the law under which he is taken to be invalid or unconstitutional he will still have his remedy by habeas corpus to test its validity. The Civil courts may in any case inquire into the validity of the process or warrant under which a citizen is detained against his will, whether in the army or elsewhere. The advice given in this opinion was therefore erroneous and misleading as not stating the law. It does not follow, of course, that one may be held guilty of an offense for giving mistaken advice as to the law.

If it is given in good faith as representing the honest though mistaken views of the party giving it it is not in itself criminal; but you have a right in connection with all other circumstances to consider its erroneous character in determining whether it was given in good faith and for an honest purpose as it the claim made here, or was intended as part of a scheme to obstruct the enforcement of this law."

This charge was erroneous, among other things, in that it mistakenly stated to the jury that the legal opinion (Government's Exhibit 1) was prepared by the defendant O'Connell and prepared for distribution and the court read to the jury as purporting to be language of the opinion, words which had been stricken out of it (page 9, C.).

TENTH [II.]—The court erred in instructing the jury as follows:

"There is also evidence tending to show that there was prepared by the defendant O'Connell a form of exemption claim to be presented and filed with the local boards for those who were notified to report for examination and that large numbers of these forms were furnished to those who joined the American Patriots, for their use before those boards, with the direction to present them to be filed, and that a considerable number were tendered by young men who objected to service; that among other things stated in this form was this language: 'I am certain that notwithstanding all the humbug and lies published in the newspapers and 'other publications of the world, there is not

'and cannot be the slightest danger to the 'United States, as this war is simply a war of 'aggression, conquest, and greed on the part of 'England, and England and her agents have 'secured a vote of Congress assisting them in 'this war, which vote was in violation of the 'constitution, and will be reconsidered by the 'next Congress, who will have full power and 'express directions from the people'. You are advised that the matter thus stated was wholly unnecessary to the statement of any legal objection the so-called exemption claim may have otherwise set up; that it would subserve no good or useful purpose in support of any such objection but was well calculated to create antagonism in the minds of those to whom it was furnished, to the law in question and induce them to oppose and refrain from conforming to its requirements and thereby bring about obstruction to its enforcement. You have a right, therefore, to consider it in the light of all the other facts and circumstances in the case in determining whether the purpose of the defendants in putting it forth was the legitimate and innocent one they claim, or was, in fact, intended to subserve the purpose claimed by the Government of provoking and inducing obstruction to the enforcement of this Selective Service Law" (pages 11-12, C.).

This instruction was erroneous for the reason, among others, that it singled out and called to the attention of the jury a disconnected portion of a paragraph and instructed the jury, as a matter of law, that it was calculated to induce persons to whose attention it was brought to violate the law.

ELEVENTH.—The court erred in charging the jury as follows:

"The evidence also tends to show that the defendants and other members of the American Patriots and persons in their employ put forth and disseminated large numbers of what are denominated in the evidence as 'Membership Circulars,' circulars soliciting membership in their organization; these circulars among other things, contain this language:

" 'The American Revolution was fought, won, 'and the Republic established, by "Sons of Lib-'erty," an organized minority, in spite of the 'opposition of Tories, grafters and grovelers, 'before wealth and office in those days, assisted 'as they were by the purchased press, suppress-'ing the truth and publishing lies, for the pur-'pose of scaring or humbugging the people. 'At present all that these American heroes 'fought for and won is in extreme danger of 'being lost. To save the Republic we have 'therefore organized the 'American Patriots.'

"This language, when read in connection with the other statements has a distinct tendency to engender opposition and resentment against the act in question and to induce refusal to comply with its requirements, and you have a right to consider it with all the other circumstances in determining whether the purpose of those sending it forth, if you find that it was so sent, was the innocent one they claim or the one claimed for it by the Government" (pages 12-13 C).

This charge was erroneous, among other reasons, because the court only called the attention of the jury to a disconnected portion of the circular in question and not to the whole of it and instructed the jury, as a matter of law, that it had a distinct tendency to induce refusal to comply with the draft law, whereas the tendency or the effect of the language used, was for the jury to determine upon consideration of the entire document.

TWELFTH.—The court erred in charging the jury as follows:

"There is also evidence tending to show that on July 3rd, the defendant Herman B. Smith made an address or speech at a public meeting in Dreamland Rink in this city in which he used this language, in speaking of this act:

'On September 1st, we are going to have a 'big lottery in this country to see which ones 'of us go over there first to be slaughtered. 'There are a lot of boys who do not want to 'go; they would undoubtedly be willing to die 'in America or to go and take part in the wars 'of this country. Now those boys friends, are 'going to demand that we stand by them. 'Everyone of us here who are above the age 'must do his share in aiding those boys to stand 'firm in their conscience and say they will not 'go. There is an organization throughout the 'whole nation to see that their fight is taken 'care of. We want your help. We have started 'one in San Francisco, here and there are others 'being started and we want you to give your 'assistance. The Government has asked you

'to buy Liberty Bonds, finance the war and give 'our boys to be maimed and killed. We want 'to save our boys at home, to save them from 'going to the Hell in Europe. Let us stay here 'and help them. Any money that you pay to-'night after defraying the expenses of this 'meeting will go to save our boys.'

"This language if not distinctly seditious in character, was at least outside and beyond any such purpose as claimed by the defendants as the objects they had in view, and its natural and only tendency would be to inflame the minds of the public and sway it against the act in question and induce them to oppose and obstruct its enforcement. It was therefore wholly unjustified for any innocent purpose and was not protected by the right of free speech or otherwise, and you have the right to so consider it in determining the defendant's purpose" (pages 13-14 C.).

This charge was erroneous, among other reasons, because the court singled out certain disconnected paragraphs of the speech for comment, which paragraphs did not give the real meaning of the speech and instructed the jury that the natural and only tendency of the language quoted was to induce and cause persons to oppose and obstruct the enforcement of the draft act. Said instruction was erroneous, moreover, in that it stated to the jury, in effect, that defendants claimed that at the time said speech was made, there was a common purpose and combination existing among them, and that the language used by the said defendant, Herman B. Smith was outside and beyond any such

purpose, whereas, in truth and in fact, defendant claimed that there was no evidence in the case tending to show any common purpose existing between the defendants of any sort at the time the speech was made.

THIRTEENTH.—The court erred in charging the jury as follows:

"In that connection there is also evidence tending to show that the defendant O'Connell, at a public speech at Lodi on August 4th, in contending that the act in question was unconstitutional and that it could not be legally enforced, among other things advised those present not to take the oath or sign any papers whatsoever that would put them in the service and declared that the men who left the United States for Europe would not return. That the average life of a soldier in the trenches was forty-eight hours, and said, in substance: 'I 'wonder if it is forty-eight hours, with those 'machine guns on both sides throwing bullets so fast that when a man throws up his head he 'is gone and when they stick up their bodies 'to run across "No Man's Land"—you wonder 'how they last forty-eight hours.' That he stated a large number of test cases would be started; that each case would be a separate case, and if a man should be ordered into the service before he could get his case tested the worst that could happen to him would be that he would stay in jail until it was decided, or be out on bail; but that the new Congress would be elected and would repeal the draft

law; that the war was not a war of defense, and that the Constitution was being violated because it did not allow them to take soldiers out of the country. If you find this evidence to be true, the advice thus given and the declarations made were not within the right of Mr. O'Connell in any purpose he may have had to test this law nor to secure aid with which to make such test nor by any right of free speech in connection with such object, and you have a right to so consider it in determining the real purpose for which the language was uttered" (pages 14-15, C.).

The said charge was erroneous for the reason, among others, that it singled out for comment only disconnected paragraphs of the transcript of the speech in question, which entirely misrepresent the real purpose and meaning of the speech, and the court instructed the jury as a matter of law that the speech was one the defendant O'Connell had no right to make.

FOURTEENTH.—The court erred in charging the jury as follows:

"It is not incumbent on the government, notwithstanding the offense is so charged, to necessarily show that all the parties alleged to have been concerned in that conspiracy were in fact participants in it in order to convict any of them. Because all the defendants on trial are included in one indictment and tried together it is not required that you convict all in order to convict any or that if you acquit

one you must acquit all. If you find that there was a conspiracy as charged and that any one of the defendants on trial was a party to it you may convict him although acquitting the others.

"It makes no difference how honest their views may have been as I have said to you, if they have done acts, which under the law, would result in obstructing the execution of this statute and there was a combination between them for the purpose, then they are guilty" (page 15, C.).

The said instruction was erroneous for the reason, among others, that it stated to the jury that the honesty of defendant's views made no difference, but that if they had done acts, which under the law, would result in obstructing the execution of the statute and did said acts in a combination, they were guilty.

FIFTEENTH.—The court erred in charging the jury as follows:

"Mr. O'Connell: I want to call your Honor's attention to that part in regard to conspiracy, that the existence of the conspiracy may be shown by circumstantial evidence. I want to except to that portion of it.

The Court: In 99 cases out of 100, perhaps, that is the only way it ever was shown or can be shown. The reason for it is this: Men engaged in an unlawful enterprise do not, as a rule, openly declare their purposes or the fact that they are working in combina-

tion, and so it must be determined by circumstances, as I said to the jury, when so determined, and they are satisfied that the combination existed, it does not make any difference whether there was ever any declaration about it.

Mr. O'Connell: But where the acts are open then the existence of the conspiracy cannot be established by inference, but must be established directly.

The Court: Actions that are susceptible of proof must be open in that sense; they may be secret in a way, but they must be susceptible of proof, otherwise they exist merely in the mind and never become overt acts" (pages 15-16, C.).

Said instruction was erroneous, for the reason, among others, that however applicable to the ordinary cases of conspiracy it was not in any way applicable to the facts in this case and could only serve to mislead the jury.

SIXTEENTH.—The court erred in instructing the jury as follows:

"The law is this: A man is presumed to intend the ordinary consequences of his voluntary act. That results in this: It does not make any difference whether one may know the exact legal consequences of an act he does; if he deliberately does the act he must know at his peril whether it would result in criminal consequences or not, because of the further principle that ignorance of the law

does not excuse. You can readily understand that if ignorance of the law did excuse, it could always be urged as a defence no matter how heinous the charge might be" (page 16, C.).

Said charge was erroneous in that it confused and made no distinction between that knowledge of the law which every one is presumed to have and knowledge of the legal consequence of an act which one may or may not be presumed to know according to the circumstances and the nature of the act. The result of the instruction was to tell the jury, in substance, that however innocent the purpose of the defendants and however incidental the result, yet, if anything, they did or said resulted in an obstruction to the law, the defendants would be guilty.

SEVENTEENTH.—The court erred in refusing to rule at the close of the Government's case that each and all of the acts done by the defendants were within the protection of the Constitution of the United States, and particularly the first amendment to said constitution, protecting free speech, free press, public assemblage and petition for redress of grievances, and that the Espionage Act, approved June 15, 1917, and the Selective Service Act, approved May 18, 1917, were null and void so far as they assumed to make criminal any of said acts of defendants (Tr., 195-198; also amended assignment of errors, subdivision 3, page 39). Since the writ of error was sued out in the present case this court has definitely decided in a number of cases that the Espionage Act, approved June

15, 1917, was constitutional so far as the question was raised by the facts of those cases. This court has also held the Selective Service Act, approved May 18, 1917, constitutional. The constitutionality of each of these acts was carefully raised in the court below and assigned in the original assignment of errors (Tr, pages 195-198). We have not included in the specifications of error herein the several constitutional questions raised in the lower court respecting those statutes because of those recent decisions of this court. We do contend, however, that a construction of those statutes which makes criminal the several acts done by the defendants as shown by the evidence, violates the rights guaranteed to them by the first amendment to the Constitution of the United States.

The foregoing specifications of error, except the second and the last, are assigned in the amended assignment of errors.

Argument.

POINT I.

The verdict is fatally defective.

The verdict simply is that the jury finds the defendants guilty on "the——— count of the indictment, and———on the———count of the indictment."

I have found no case where a verdict so defective as this one was ever received by a court and sentence pronounced on it, but there are a number of cases in which the appellate courts have set aside

verdicts less faulty than the one under consideration.

See

Campbell vs. Regina, 11 Adolph. & Ellis (N. S.), Q. B., 799 (affirmed on error to the Exchequer Chamber, 11 Adolph. & Ellis (N. S.), 814.
Day vs. People, 76 Ill., 380.
Scott vs. State, 4 Okla. Cr. Rep., 70.
State vs. Snyder, 32 Wash., 299.

An exception to the reception of such a verdict, or an assignment of error on account of it, is not necessary to enable the appellate court to protect the rights of the accused by setting the verdict aside.

Holmes vs. State, 58 Neb., 297.
State vs. King, 194 Mo., 474.

Even in civil cases this court will set aside defective verdicts, although the defect was not noticed in the court below or argued on the appeal, when it appears that the finding of the jury is different from the issue or is confined to a part only of the matter in issue.

Patterson vs. U. S., 2 Wheat., 221.
Garland vs. Davis, 4 How., 131.

The following are a few of the cases in this court and in the United States Circuit Court of Appeals where convictions in criminal cases have been ex-

amined into or set aside on errors not excepted to below or assigned as error on appeal:

Wiborg vs. U. S., 163 U. S., 632.
Clyatt vs. U. S., 197 U. S., 207.
Crawford vs. U. S., 212 U. S., 183.
Weems vs. U. S., 217 U. S., 349.
Williams vs. U. S., 158 Fed. Rep., 30, 36 (C. C. A., 8th circuit).

In the case last cited the conviction was reversed on account of error in the charge, to which no sufficient exception was taken. The circuit court said:

> "Without discussing the question suggested as to whether or not there was sufficient exception saved to this instruction, it is sufficient to say that in a criminal case where a plain error is committed in a matter vital to the defendant, especially in a case like this where the defendant received the severe punishment of one year and six months in the penitentiary, in addition to the fine, it is the province of the appellate court to correct it."

In the Wiborg case, *supra*, no motion or request was made that the jury be instructed to find for the defendants on account of the insufficiency of the evidence. The court said:

> "And although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants we feel ourselves at liberty to correct it."

This principle has been applied in a great variety of cases.

Morse vs. U. S., 174 Fed. Rep., 539 (C. C. A., 2nd Circuit).

Holmes vs. U. S., 182 Fed. Rep., 485, 486 (C. C. A., 8th Circuit).

Pettine vs. Territory of New Mexico, 201 Fed. Rep., 489, 497 (C. C. A., 8th Circuit).

Gillette vs. U. S., 236 Fed. Rep., 215, 218 (C. C. A., 8th Circuit).

Oppenheim vs. U. S., 241 Fed. Rep., 625 628 (C. C. A., 2nd Circuit).

Taylor vs. U. S., 244 Fed. Rep., 321, 324 (C. C. A., 4th Circuit).

The rule to be extracted from all the authorities is that where in a criminal case the error goes to the substantial rights of the defendant the court may consider it and grant appropriate relief, without exception or assignment of error, particularly where as here the sentence is severe and involves a long term in prison. So that, entirely aside from the question whether the error in the reception of this defective verdict was excepted to, or properly assigned as error, it appears on the face of the record and is before this court for consideration. It is idle to speculate on the possible meanings of this verdict. Whether some of the jurors intended to find the defendants guilty on one count and some intended to find them guilty on the other count only, or whether it was intended to find the defendants guilty on one count and not guilty on the other, is purely a matter of speculation. No one

can know from this verdict what the jury intended. But the defendants are entitled to a verdict which shall find them guilty or not guilty on each count of the indictment. No one can say from this verdict of what offense, if any, defendants had been convicted or acquitted; and until that is done it would seem that they are liable to be put on trial again for the same offense.

U. S. vs. Perz, 9 Wheat., 579.
Simmons vs. U. S., 142 U. S., 148.

Suppose the President should decide to pardon the defendants, or some of them, for the offense charged in one count of the indictment; no one could tell whether they were pardoned for the offense of which the jury intended to acquit them, or for the one for which it was intended they should be convicted. So also if in any subsequent prosecution the defendants desired to plead their acquittal or conviction of the offense charged in this indictment they would be unable to do so, because the verdict does not indicate on which count they were acquitted and on which they were convicted. Of course as to the defendant O'Connell it is obvious that the verdict is fatally defective, for his sentences run consecutively. Nor will it do to say that the court will treat the verdict as equivalent to a conviction of the lesser of the two offenses, and permit sentences to stand on the count of the indictment setting up the lesser offense. This would be to substitute a trial by court for a trial by jury in a criminal case. Moreover, it would leave both the accused and the government wholly uncertain as to their rights in the case I have mentioned where

a pardon was granted as to certain of the offenses, or another indictment returned against the defendants for the same acts.

Public policy also requires that a verdict such as this one should not be received by any court. Once let the precedent be established that a court may supply the most material elements of a verdict according as it may guess at the jury's intentions, and the whole structure of the law respecting jury trials will be subverted.

POINT II.

The Court erred in refusing to direct a verdict of not guilty at the conclusion of all the evidence, on the ground that the conspiracy charged in the indictment had not been proved.

The charge in this case is conspiracy. The inquiry is not whether the defendants or some of them may have done or said that which would make them liable to prosecution individually, but it is whether the defendants *conspired* as stated in the indictment. A conspiracy involves an agreement or mutual understanding. It is a combination of two or more persons to accomplish a criminal or unlawful purpose by concerted action, or to accomplish some purpose not unlawful by criminal means.

U. S. vs. Hirsch, 100 U. S., 33;
Pettibone vs., U. S. 148 U. S., 197, 203.

That the conspiracy must be established beyond a reasonable doubt, and that acts done and declarations made by alleged conspirators prior to the time the conspiracy was formed are not admissible, are of course elementary propositions of law. Acts and declarations of alleged conspirators are only admissible in evidence when done or made while the conspiracy is pending and in furtherance of its object.

Logan vs. U. S., 144 U. S., 263, 309;
Brown vs. U. S., 150, U. S., 93, 98;
Winchester vs. Creary, 116 U. S., 161;
Union Pacific Coal Co. vs. U. S., 173 Fed. Rep., 737.

It is the singleness attaching to the conspirators as a body and the combination growing out of the common design that makes the declarations or acts of one admissible against all. The reason for the rule admitting such evidence fails when the declarations or acts precede the conspiracy.

Langford vs. State, 130 Ala., 74;
Jones on Evidence, §254;
Greenleaf on Evidence, (16th Ed.), §94.

It is only necessary to examine the evidence with these elementary principles in mind to see that no conspiracy was established. I understand of course that this court will not weigh conflicting testimony, but that its duty in this case is confined to an examination of the record to determine whether it discloses competent and substantial evidence fairly tending to sustain the verdict.

Abrams vs. U. S. (decided November 10, *1919*), *40* Sup. Ct. Reporter, 17.

It is necessary, however, to consider the evidence in this case in the light of the events transpiring at the time it is alleged this conspiracy was formed and in process of execution. The war was declared on the 6th of April, 1917. Up to within a few weeks of the declaration of war the people of this country had been exhorted by the President and other officials in responsible positions to remain neutral. They had fully grasped the significance of the phrase "Peace without victory." The events which appealed most to the public sentiment as a cause for war, such as the invasion of Belgium, the sinking of the Lusitania and other outrages upon the seas, had taken place long before and they had not been accepted as a cause for war. The dangers of engaging in a foreign war, even though we should emerge a victor, were fully realized. We realized that war meant not only woe to the conquered, but that it also meant woe to the conquerors as well. "Vae victoribus" was no less to be regarded than "Vae victis." Suddenly, however, and without thorough preparation of the public mind for the event, war was declared. It was inevitable that there should follow great confusion of public thought and purpose. Following almost immediately upon the declaration of war came the Draft Law, effective May 18, 1917. Within less than thirty days after that came the Espionage Law. Many millions of our people believed that in these measures they saw the realization of their worst fears from the militaristic policy, which they believed was foreshadowed by our entrance into the

war. It is charged in this indictment that the conspiracy to violate the Espionage Law was formed on June 16, 1917, the day after the passage of the law, and that the conspiracy to violate the Draft Law was formed on June 1, 1917. There had scarcely been an opportunity to learn the provisions of these laws at the time it is claimed these defendants entered into a conspiracy to violate them. The fact simply is that on June 3, 1917, the members of the Socialist party in San Francisco held a meeting at which the St. Louis platform of that party was distributed and those platforms were taken over to a hotel near the hall for distribution at the meeting by the defendant David J. Smith. The prosecution, in the hope of getting that platform in evidence, laid the conspiracy in one count of the indictment early enough to take in evidence of that meeting, including the platform. At that time the defendants, the Smith brothers, who are the only Socialists among the defendants, did not even know the other defendants. The Gambo and Cohen cases defended by O'Connell, wherein indictments were found on the 19th day of June, 1917, were unheard of by the other defendants, and the prosecution's desire to get O'Connell's action in defending these cases before the jury, is the only explanation suggested for charging the conspiracy, in the other count of the indictment, to have been formed on June 16, 1917. So it was with the meeting of July 3, 1917, at Dreamland Rink to petition Congress, among other things, against the use of our naval and military forces for conquest in the war. It was but one of many hundreds of similar meetings held through-

out the country. There was no sort of combination or agreement shown among any of the defendants respecting this meeting; and until long subsequent to that meeting there is no more evidence of a combination among the defendants in this case than there is evidence of a combination among the millions of people who were holding meetings from Maine to California to protest against the Espionage Law and the Draft Law and the continuation of the war for aggressive purposes, and other measures which many people believed were endangering the safety and welfare of the nation. There is absolutely nothing in this case upon which to base a charge of a combination for any purpose among the defendants up to the time "The American Patriots" was incorporated.

The "American Patriots" had its inception in a public meeting held on the *11th or 12th of July,* in the assembly hall of the Pacific Building, San Francisco. Somewhere from twenty to forty people were present. There is no evidence of any concert of purpose of any sort among defendants prior to the meeting. Mr. O'Connell made a speech at the meeting in which he dealt largely with the question of the constitutionality of the draft law, and also spoke of the political phase of the subject, and said that when another Congress was elected, it would probably repeal that law. He also spoke of the initiative, referendum and recall. He also spoke of the expense of testing the law in the courts, saying that it would take from $2,500 to $5,000 to get the questions before the Supreme Court of the United States and to employ the eminent counsel desired to argue a question of such importance and spoke of the formation of a corpora-

tion for the purpose of raising the money through membership fees necessary for that purpose. A committee was appointed at the meeting to draft the articles of incorporation. It does not appear from the record who composed the committee. The articles of incorporation were prepared, however, the next day, and left with Daniel Yost, Esq., an attorney of San Francisco, for the purpose of having the same signed. Mr. Yost occupied offices adjoining those of Mr. O'Connell. (See testimony of Mr. Yost, pages 125, 126, and 127). Herman B. Smith attended this preliminary meeting, having been told about the proposed meeting by someone on the day that it was to be held. The purpose of the meeting, as he understood, was to formulate plans to test the constitutionality of the draft law. The defendant Herman B. Smith gives the best account of what occurred at this meeting. His testimony will be found (pages 151-152). His testimony is undisputed that there was no statement by any one at the meeting about getting out of the draft or evading the law, but simply to find means of financing litigation to test the constitutionality of the law in the case of those persons who had determined to test that question. The District Attorney at the trial interrupted the testimony of this witness to say that there was no dispute concerning what was said and done at the meeting (page 152). Defendant, David J. Smith, was not at this meeting but volunteered the next day to go with his brother and with others to sign the articles of incorporation (page 152). The articles of incorporation were signed the next day and appear in evidence as "U. S. Exhibit No. 3" and the material portions thereof are set forth in the appendix to this brief. They were signed by the defendants,

Daniel O'Connell, Herman B. Smith, David J. Smith and Margaret Malloy. The name of Julia Manley was, by her request, signed to the articles by Margaret Malloy (page 83). The first meeting after the organization of the corporation was held on July 17th, following. At this meeting, Mr. O'Connell acted as temporary chairman, and Mrs. Malloy as temporary secretary. A by-law was adopted declaring all those persons to be eligible to membership who were American citizens or who had taken out their first papers (page 84). "U. S. Exhibit No. 6" gives the dates and minutes of this and subsequent meetings of the organization. We do not understand that any claim is made that the minutes of this or any subsequent meeting of the corporation show anything seditious or improper to have occurred. The defendants, Smith brothers, resigned from the organization at the time of the meeting of July 17th, and never attended any more meetings or had anything to do with the subsequent activities of the organization (page 143). It is plain from the evidence that their sympathies and activities were with the peace council which seems to have been an organization extending throughout the country with a membership of several thousand in San Francisco (page 159), and not with the organization known as the "American Patriots." Mrs. Malloy remained as secretary of the organization until the defendant Karl J. F. Wacher was elected to that position on August 13th, following (page 118). Wacher had nothing to do with anything connected with this case until he joined the American Patriots, August 6, 1917 (page 114) which was the date defendants were arrested (page 114). Defendant, Dr. E. R. Hoffman be-

came a member and treasurer July 21st (page 132).

Louis Serbin, a boy of seventeen years of age, was assistant to the secretary while Mrs. Malloy was secretary and seems to have largely looked after the work of that office (See his testimony, 108-111). The district attorney admitted that he did not contend that there was any secrecy about any of the meetings of the organization (page 109). After its organization, the American Patriots entered upon an active publicity campaign to secure members. It issued a circular signed by the president, defendant O'Connell and the secretary, Margaret Malloy, (U. S. Exhibit No. 2). The circular appeals for membership among American citizens only and sets forth the purposes of the organization only as stated in its articles of incorporation. The Government, over objection and exception, introduced what it called "membership slips" in the American Patriots (page 38—U. S. Exhibit No. 4); also a moving picture slide purporting to advertise the American Patriots, and a list of theatres (U. S. Exhibit No. 5), and paper (U. S. Exhibit 7) purporting to be a contract to exhibit the slide at certain theatres. It does not appear, however, by whom these exhibits were prepared or authorized (page 39).

"U. S. Exhibit No. 8" is a copy of a newspaper clipping and a report of a policeman arresting some driver of a wagon with a placard advertising the American Patriots. The driver of the wagon does not appear to have had anything to do with the American Patriots, and by whom the placard on the wagon was authorized, does not appear (page

40). U. S. Exhibits Nos. 10, 12, 19, 22, 24 and 25 are exemption claims filed by John Murphy, the defendants Carl J. F. Wacher and Thomas Carey, and by Jacob M. Hirschman, A. Wuestefeld and Joseph A. Lame. The exemption claims are all in the same form and no criticism of the form of the claim appears to have been made except the last portion of the last paragraph, which asserts that the war on the part of England is a war of greed, and that the United States is not in the slightest danger, and that England had secured a vote of Congress assisting her in the war and that the next Congress would reconsider the draft act. This clause was inserted in the claim by defendant Carey (pages 164-165), and he insisted upon its going in, because, as he said, he had no use for England (page 165). He further testified that he believed the law to be unconstitutional, that he wished to see the question tested and if it was decided to be a valid law, he was ready to go to war. (See Carey's testimony, page 165). Apparently the claim with this clause in it was copied and used only in the few instances mentioned in the testimony and was filed only by those persons who, like Carey, had made up their mind that the draft law was unconstitutional and desired to have the question tested.

On August 4th, 1917, defendant O'Connell went to Lodi, California, to make a speech. This is the third of the overt acts set out in the indictment, the first overt act being the incorporation of the "American Patriots," and the second, the filing of the Carey exemption claim. The defendant O'Connell went to Lodi to make the speech in question at the invitation of the Rev. William C. Mengedoth,

a pastor of one of the churches of that town. The Rev. Mengedoth was included as defendant in the indictment but the District Attorney afterwards dismissed as to him and called him as a witness at the trial. The Rev. Mengedoth asked Mr. O'Connell to come to Lodi to answer many questions as to the constitutionality of the draft act which were being asked of him and which he was unable to answer, and Mr. O'Connell agreed to do this. Mr Mengedoth before inviting Mr. O'Connell to come had investigated Mr. O'Connell's standing in the community and the organization known as the American Patriots. Mr. O'Connell never said anything about obstructing the draft act or persuading persons not to register. The Rev. Mengedoth had many religious conscientious objectors who were members of his church and others interested in the question whether the draft law was constitutional or not (see pages of his testimony, 33-38). The Government had Mr. O'Connell's speech at this meeting taken down by a government agent, Edwin S. Parker (page 45), and a copy of the speech in typewriting was produced by the government and marked "U. S. Exhibit A for identification" (page 45), but the prosecution did not put the speech in evidence. Later the defendant put this typewritten copy of the speech in evidence and it appears as defendant's "Exhibit A" (page 114). The government relied for a report of what Mr. O'Connell said at the meeting upon the testimony of Ashley Turner, a newspaper man in the audience (pages 57-58), and who apparently was there by arrangement with a secret service agent (page 58). It appears from the testimony of this witness and more particularly from the typwritten report of

the speech above mentioned, as it was taken by a representative of the district attorney's office, that Mr. O'Connell made a long and elaborate argument to show that the draft law was unconstitutional. He insisted, however, that no matter what one's personal objections or feeling respecting the law might be, every step of the procedure should be obeyed, but that no oath should be taken which would put the draftee under military law if he desired to test the constitutionality of the law before a civil court where all civil rights would be recognized and protected (pages 59, 119, 128). O'Connell made it very plain that he was not advising against joining the army either as volunteers, or under the draft law, but was only pointing out the method to be pursued in the case of those who, believing that the draft law was unconstitutional; and therefore no law at all, desired to test that question in the courts. He referred to the large number of test cases which were going to be started. Some one from the audience got up and asserted that before the Supreme Court could decide the cases, the war would be over, to which Mr. O'Connell replied "I have more confidence in the Supreme Court, brother, than you have" (page 58). There was not only no evidence of any attempt or purpose on the part of any of the defendants to induce men not to register or take the physical examination but the trial court so in substance stated at the conclusion of the prosecution's case (pages 91, 92; Original Print, 148). During the trial, the government introduced a paper entitled "Legal Opinion and Advice on Conscription Law to American Patriots." The preparation and circulation of this document by defendant O'Connell is charged in the

indictment as the fourth and last of the overt acts. The court, in an instruction to which exception was duly taken (pages 7-9 C), told the jury as a matter of fact that this was an opinion prepared and put out by O'Connell and put out and furnished through the American Patriots to people who came to the office. The facts are that the so-called opinion (U. S. Exhibit I), is an unsigned, incomplete paper, partly in typewriting and partly in handwriting, with certain words scratched out. There is no evidence to show that it was ever prepared by Mr. O'Connell or by any other defendant but it appears to have been prepared by an attorney, Mr. Yost, who had a reception office in common with Mr. O'Connell (page 53), at least the government witness Mattie M. Barclay testified that she typed several copies of the opinion (U. S. Exhibit I) for Mr. Yost and gave them to him (page 53).

Government witness Mengedoth testified that no one gave him the paper but he found it on the desk either in O'Connell's office or the adjoining office, which would be that of Mr. Yost (page 36). He took it home of his own accord to look over and show to some of his parishioners, but in fact, never did show it to them, because, upon arriving home, he found that he had to go away immediately and kept the opinion in his pocket, and thinks that he eventually gave it to O'Connell (page 36). He appears not to have had any conversation with O'Connell about it. There was an opinion in the office, however, which had a seal on it, but this was not the opinion introduced. Government witness Gray who, while employed by the American Patriots was also acting as agent for the Department of Justice, testified that he saw one copy of the

legal opinion on a desk in the office and one which had the seal of the American Patriots on it (see bottom of page 64), but he was not asked to identify either as identical with or similar to United States Exhibit I. Dr. Hoffman (page 139) and some other witnesses testified to seeing some opinion on a desk in the offices but no one pretends to identify it as being the paper "U. S. Exhibit I" or that its purport was the same or similar. A copy of "U. S. Exhibit I" will be found in the appendix of this brief.

The foregoing, together with the testimony showing the activities in the office of the American Patriots, such as writing letters, holding interviews and similar work, all of which it was admitted was conducted openly and publicly constitutes the substance, as we understand it, of the evidence relied upon by the prosecution. Substantially all the witnesses of the prosecution examined upon the subject, however, testified that they never heard Mr. O'Connell say to or advise any one, not to comply with the law in every respect but that he said that every one should take every legal step the law required.

Government witness, Adam Metler, testified (page 60; Original Print, page 99):

> "He (Mr. O'Connell) told everybody up there at Lodi to take the examination and follow every legal step, to take the legal course."

Government witness Christman testified (page 62; Original Print, 102):

> "At that meeting that night at Lodi, I heard Mr. O'Connell say, in answer to somebody's

> question 'everybody should follow the law and take every legal step required by the act.' * * * Somebody asked about taking the examination Monday morning, and Mr. O'Connell told them to go and take it, and he followed that up by saying 'Take every step required by the law.'"

Government witness Hirschman testified (page 71; Original Print 116):

> "I heard Mr. O'Connell at these meetings in the Pacific Building state that he believed that everybody who wanted to enlist should enlist, and that it was their duty to enlist, * * * and that it was only for those people who had conscientious objections and who determined in the first place not to enlist, and also to test the unconstitutionality of the draft act, that the organization had nothing to do with only those people."

The whole substance of the evidence on this point, shows that Mr. O'Connell at public meetings and in personal interviews uniformly advised that every legal requirement such as registering, filling out and returning the questionnaires and taking the physical examination should be complied with. Whether correctly informed or not, he assumed that the actual induction into military service was accomplished by means of some form of oath which would be considered as a voluntary act whereby the right to test the constitutionality of the law in an ordinary criminal trial would be waived, and that consequently anyone who had

determined to test the constitutionality of the law should not take that oath. Fairly considered, the sum of all the evidence in the case goes no further than I have stated.

POINT III.

The court erred in the admission of evidence.

Sufficient has already been said to make clear the errors of the court in admitting the following evidence: (1) the majority platform of the Socialist party adopted in St. Louis April, 1917, and the facts and circumstances surrounding the seizure by agents of the Department of Justice of the platform so introduced; (2) the red cards advertising the above meeting; (3) the records in the Gambo and Cohen cases; (4) the dodgers or handbills advertising the meeting of July 3, 1917; (5) the speech of Herman B. Smith made at that meeting. The evidence was admitted against all the defendants on the theory that a conspiracy existed among them, and yet the facts now show that there was no combination or understanding of any sort among the defendants until subsequent to July 3, 1917. It needs no argument to show that every item of this evidence was most damaging in character. The proclamation and war program of the Socialist platform (U. S. Exhibit 16, admitted in evidence) pledges *"continuous active and public opposition to the war through demonstrations, mass petitions and all other means within our power."* That document was referred to by this

court in the Debs case, 249 U. S., 211, and has been referred to by other courts as evidencing a purpose to obstruct the recruiting and enlistment service of the United States. Yet it was admitted against the defendants who were not Socialists and who never subscribed to the war program of that party as announced in its St. Louis platform but who were always opposed to it. All of the above mentioned evidence was highly prejudicial and its admission and retention in the record over the objections made to it and in spite of the motions made to strike it out warrants a reversal by this court.

Sparf & Hansen vs. U. S., 156 U. S., 51.

POINT IV.

The learned Trial Judge erred in his charge to the jury.

The purpose of a charge is to explain the law of the case, to point out the essentials to be proved on the one side and on the other, and to bring into view the relation of the evidence to the issues involved. The instruction must not be argumentative and it must not select portions of the evidence of one side and emphasize it unduly to the prejudice of the other.

Hickory vs. U. S., 160 U. S., 408.
Allison vs. U. S., 160 U. S., 203.
Thompson vs. U. S., 155 U. S., 271.
Bird vs. U. S., 180 U. S., 356.
Beard vs. U. S., 158 U. S., 554.

Tested by the familiar rule laid down in the above and many other cases, it is plain that the charge in this case was erroneous and that defendants were prejudiced by it in at least the following particulars:

(1): The portions of the charge set forth in the specifications of error, considered together, could not have failed to convince the jurors that the judge believed defendants guilty and that it was the duty of the jury so to find.

We all know how prone a jury is in most cases to find a verdict in accordance with the views of the judge presiding at the trial, if the jury is able to ascertain from the charge or otherwise, what the views of the judge are. At the time this case was tried, the war spirit was sweeping over the country. It was very hard to find men anywhere who could calmly discuss or fairly consider the great new issues which were confronting the people. Neighbors and life-long friends freely imputed to each other sinister and improper motives as a reason for beliefs held and expressed concerning the policy of the war and the legislation immediately arising out of it. We are now gratified to know that in the large majority of those cases such imputations were wrong; that in the main, the citizens of this country desired above all else their country's good and the adoption of those policies by the administration which would promote the welfare of all. The indictment in this case was found on September 7, 1917 (T. of Record, page 6). An elaborate demurrer, which shows that the only question in the mind of the pleader was the constitutionality of the Draft Act, was filed on Septem-

ber 11th, 1917 (page 15). The demurrer seems to have been overruled the same day and the defendants were ordered on trial the next day (page 16). It is hard to imagine a case where justice required a more careful and dispassionate statement of the rules of law to the jury than the present one. Yet I respectfully submit that the review contained in the judge's charge above noted, of those portions of the evidence which it was believed bore most strongly against the defendants to the exclusion of the other evidence in the case left the jury no alternative but to convict. While it does not appear that the entire charge is contained in the Bill of Exceptions as brought up on the certiorari proceedings it does appear from the charge quoted that the judge did not review all the evidence in the case, and that he left it to the jury to recall the evidence as best they could, except certain of the facts which he reviewed in the charge contained in the Bill of Exceptions. Had there been anything in the charge which modified the instructions given or minimized the damage to the defendants done by the portions quoted, it is fair to assume that the government would have produced here the balance of the charge.

(2): The court stated to the jury the prosecution's theory that an unlawful combination had been formed among the defendants to obstruct the carrying out of the Draft Act, and that the organization of the "American Patriots" was merely a mask behind which the defendants hoped to carry on their criminal purpose, thereby escaping individual responsibility, etc. The court then said:

> "If you find this theory of the government to be sustained by the evidence, then it will be your unquestioned duty to find the defendants guilty."

Now, the question for the jury to decide was not whether the prosecution's *theory* was *sustained* by the evidence but it was whether the evidence established *beyond a reasonable doubt* the formation of the conspiracy as alleged in the indictment, and the doing of one or more overt acts in pursuance of said conspiracy. This error was emphasized in the next paragraph of the charge where the Court said to the jury:

> "There is evidence before you which is sufficient in its legal tendency, *that is sufficient as a matter of law,* to sustain the government's theory."

Now, what was there left to the jury? They were told in one sentence that if they found the government's theory to be sustained by the evidence they must convict, and they were told in the next sentence that there was sufficient evidence before them to sustain the government's theory. Although the Court left to the jury the question whether the evidence produced by the government was true or false, that did not, in any way, correct or reach the error in the charge just noted. There was little dispute concerning the *facts* of the case. The dispute was respecting the inferences which were to be drawn from the facts. Every word of the government's evidence might be true and yet the jury have acquitted the defendants because they did

not believe that the wrongful intent existed which was necessary to complete the crime. Moreover, the word "sustained" means little if any more to the layman at least, than the word "supported," and the charge amounted substantially to a statement to the jury that if the government's theory was supported by the evidence it would be their duty to convict.

(3): The Court repeatedly singled out a single sentence or part of a sentence from a speech or document and told the jury as a matter of law that the language was wholly unjustified for any innocent purpose and was well calculated to bring about an obstruction of the Selective Draft Law. Such, for example, were the instructions concerning the so-called legal opinion, which the Court erroneously told the jury was prepared by the defendant O'Connell to be furnished to persons who might call at his office; to the same effect also were the instructions relating to certain sentences in Mr. O'Connell's speech at Lodi and Herman B. Smith's speech of July 3rd, and in a few lines taken out of a paragraph of an exemption claim and a portion of a membership circular issued by the American Patriots. In all these instructions, the learned Trial Justice committed a double error: First: He singled out for comment a sentence or two from an entire speech or document and led the jury to believe that the part referred to could be fairly weighed and considered disassociated from its context. The parts so singled out by the learned judge in every instance had an entirely different meaning when the document or

speech was considered as a whole. Second: He then advised the jury as a matter of law that the language to which he had called their attention tended to obstruct the enforcement of the law. The Court thus left practically nothing for the jury to decide except the question whether the speech was delivered or the document written. So far as I am aware, in all similar prosecutions, the courts have been careful to leave to the jury the very questions which the learned Trial Court took from the jury in this case. Even a judge of a Federal court has no right to persuade the jury as to the facts or argue the case for the other side.

Oppenheim vs. U. S., 241 Fed. Rep., 625 (C. C. A., 2nd Circuit).

The charge of Judge Augustus N. Hand to the jury in the case of U. S. vs. Eastman, et al., in the United States District Court, Southern District of New York, delivered April 25, 1918, states, I believe correctly, the rights of citizens to criticize the laws or policies of the government even in time of war, and said:

"I do not have to remind you that every man has the right to have such economic, philosophic or religious opinions as seem to him best, whether they be socialistic, anarchistic or atheistic, and that you should divorce yourselves from any prejudice you may have against any defendant by reason of proof of any such opinions on his part.

"Each defendant has the constitutional right of freedom of speech also, unless he vio-

lates the express law which he is accused of violating, no matter how ill-timed, unsuited to your sense of propriety, or morally wrong his opinions, utterances or writings may be. * * *

"Every citizen has a right without intent to obstruct the recruiting or enlistment service, to think, feel and express disapproval or abhorrence of any law or policy or proposed law or policy, including the Declaration of War, the Conscription Act, and the so-called sedition clauses of the Espionage Act; belief that the war is not, or was not, a war for democracy; belief that our participation in it was forced or induced by powers with selfish interests to be served thereby; belief that our participation was against the will of the majority of the citizens or voters of the country; belief that the self-sacrifice of persons who elect to suffer for freedom of conscience is admirable; belief that war is horrible; belief that the Allies war aims were or are selfish and undemocratic; belief that the Honorable Elihu Root is hostile to socialism and that his selection to represent America in a socialistic republic was ill-advised.

"It is the constitutional right of every citizen to express his opinion about the war or the participation of the United States in it; about the desirability of peace; about the merits or demerits of the system of conscription, and about the moral rights or claims of conscientious objectors to be exempt from conscription.

"It is the constitutional right of the citizen to express such opinions, even though

they are opposed to the opinions or policies of the administration, and even though the expression of such opinions may unintentionally or indirectly discourage recruiting and enlistment."

See also:

U. S. vs. Baker et al., 247 Fed, Rep., 124.
Masses Publishing Co. vs. Patten, 244 Fed. Rep., 535.
Masses Publishing Co. vs. Patten, 246 Fed. Rep., 24.

(4) The learned Trial Court, through inadvertence, erroneously stated the facts to the jury. This is illustrated in the remarks made by the Court to the jury concerning the so-called legal opinion. This paper, the Court stated, was prepared by O'Connell, when, as we have seen, the testimony tended to show that it was prepared by another attorney named Yost, but at any rate, there was no evidence to show that it was prepared by O'Connell. Furthermore, it was not prepared in order to be furnished to persons who might call at the office, as the Court stated, but it seems to have been no more than an incomplete memorandum in which some questions had been written out and tentative answers inserted. It was a mere, incomplete, fugitive memorandum dealing tentatively with questions arising in litigation and seems to have been regarded by no one except Mr. Mengedoth, who picked it up from a table in an outer office. It does not rise to the dignity of an opinion. Moreover, the Court, in making use of it with the

jury read to the jury the language of the opinion which had been scratched out of it, evidently because it was regarded as erroneous by whoever prepared it.

If it can bear the interpretation that it was an argument against obeying the law, it is contrary to every utterance of Mr. O'Connell made in public or private. It is perfectly plain that Mr. O'Connell's whole point, as he stated it again and again, in public speeches and in private conversations, was that every step of the law should be obeyed. If, however, according to his view, the drafted man voluntarily took the oath which would put him into the military service, that would give the military courts jurisdiction over him, and place him in a less favorable position than before to test the constitutionality of the law. If, under the statute and the regulations of the President, as the court seems to have instructed the jury, a drafted man is not required to take any oath but is in the military service from the time he has been notified to appear for military duty, then no advice which Mr. O'Connell ever gave is open to criticism. It is undisputed that he advised and urged every one to register and to take the medical examination, which, on the government's theory, is all that was necessary to bring the draftee under military law. So also the expression in the exemption claim that the signer was ready to fight for the United States but not for England was put into the claim by Carey who said he had no use for England and not by O'Connell, as the court stated. At most, it was a mere statement of opinion and not a statement of fact and could not be interpreted as a false statement within the meaning of the Selective Service Act; but

whether regarded as an opinion or a statement of fact, it was no evidence of guilt unless the jury believed beyond a reasonable doubt that it was made to promote the objects of the alleged conspiracy.

(5). The learned trial judge told the jury in effect (Sixteenth Specification of Errors) that it did not make any difference whether defendants knew the exact legal consequences of the acts they did. If they did the acts deliberately, they must know at their peril whether those acts would result in criminal consequences, and the court gave as a reason for this statement that ignorance of the law excuses no man.

I fail utterly to see any connection between the maxim that ignorance of the law does not excuse and the principle announced by the court that one must know at his peril whether an act which he believes to be perfectly lawful and proper may in some manner produce unlawful results. As applied to the facts of this case, this rule could only mean that if one agitated for the repeal of an obnoxious law or became active in a movement to have its constitutionality tested in the courts, he must know, at his peril whether such action on his part might lead someone to violate the law. No one can agitate for the repeal of a law or support a movement to have it declared unconstitutional by the courts unless the law is attacked as a bad or unconstitutional measure. If one is permitted to argue against a law at all he must be permitted all the weapons of discussion, which include not only persuasions and reasoning but ridicule and condemnation. Before there is any change of getting an obnoxious law

repealed, it is necessary in most cases that a great body of public sentiment hostile to the law be organized or created. Now, it is idle to say that this can be done especially in a case where the law is supported by powerful interests or influences, without bringing about a condition of public interest or excitement which may lead someone to violate the law. If the Espionage Law is to be given a construction which produces this result, then it would clearly violate the first amendment to the constitution for in no more other effective way could free public discussion of any measure be suppressed. Certainly no such rule has been laid down by this court, and the strong current of authority in the trial courts where this question has been involved has been against the rule stated by the learned trial justice in the present case.

Moreover, the above quoted instruction had no application to the present case which was one for conspiracy and not simply for obstructing the recruiting or enlistment service.

I am aware that this brief is already much too long and I shall not further argue the specifications of error, but respectfully submit them to the consideration of the court. This is the first case so far as I am aware arising under the Draft Act or Espionage Law which presents the right of a reputable body of citizens to combine their efforts for the purpose of testing the constitutionality of a law or to bring about its repeal. Before the verdict of a jury rendered during a time of great public excitement incident to the war can be permitted to convert such a combination into a criminal conspiracy to subvert the law, it must at least plainly appear that the instructions given to the jury were

fair and impartial, and correctly stated the rules of law which govern the rights of citizens in war as well as in peace. That the instructions given in this case do not measure up to that standard is apparent.

It is respectfully submitted that the judgment should be reversed.

GILBERT E. ROE,
Attorney for Plaintiffs-in-Error,
Daniel O'Connell and Carl J. F. Wacker,
New York City.

JOSEPH L. TEPPER,
Counsel.

Washington, D. C.

Appendix Containing Material Portions of Government's Exhibts.

United States Exhibit 1.

LEGAL OPINION AND ADVICE ON CONSCRIPTION LAW TO AMERICAN PATRIOTS.

1st. If the Conscript law is unconstitutional then it is void, and no law. In my opinion it is

but

plainly unconstitutional and void, ~~and~~ *a test in the Courts is the only method to finally determine it.*

2nd. Will they report to exemption or examining boards?

Ans. As the boards might have them take the oath or sign some papers putting them in the mili-

~~*to not go but*~~

tary service the safest way is ^A simply file an affidavit of exemptions, *as the best and safest method of testing the law.*

3rd. If they refuse to go, are they under military law?

Ans. No, they are not.

4th. Can the military authorities proceed against them?

Ans. No.

NOTE.—The original of this exhibit is partly typewritten and partly written by hand; the part written by hand is represented in print by italics: a line is drawn through the words scratched out in the original.

5th. What can be done for such refusal to be conscripted?

Ans. No more than for the commission of any other misdemeanor. If they want to prosecute, they must make a sworn complaint to the U. S. Commissioner, who may issue a warrant and the party can give bail the same as in any other criminal case, and all the question of fact and law must be tried before a judge and jury.

The military authorities can have nothing to do with it. There can be no proceedings before any court martial, or any other proceedings under military law. The civil law is in full force, and the military law has no force whatever. Only those who have been sworn in as members of the army and navy are subject to military law.

The constitutionality of the conscript law will be tried and tested in the trial in the U. S. District Court. If the jury should find the defendants "not guilty," that ends it. If the jury should find them "guilty," then the case will be taken to the Supreme Court of the United States at Washington, D. C., on the questions of the constitutionality of the law. The case cannot be heard there before December or January and a decision may not be rendered until February or March, 1918. If the law is declared unconstitutional that ends it all.

If it is declared constitutional, then the worst that can happen is that the defendants will have to serve a year in jail.

6th. What after that?

Ans. Nothing. They cannot be twice punished for the same offense and they are free after serving their sentence. But in the meantime a new

Congress will have been elected and that Congress will be 20 to 1 against the war, and will repeal the conscript law, and also the declaration of war, and make peace so far as the United States is concerned. This will also release any person who might be in jail for resisting the conscript law.

United States Exhibit 2.

Daniel O'Connell, President.
Margaret Malloy, Secretary.

AMERICAN PATRIOTS
(Incorporated July 14, 1917)

Headquarters
Room 714 Mechanics Building
Market Street, Cor. of Mason Street
San Francisco, Cal.

Dear Sir or Madam:

Your good thoughts, intentions, and enthusiasm, have little effect unless followed by action. The necessary work and expense is too great for individuals, therefore co-operative organized action is necessary. The American Revolution was fought, won, and the Republic established, by "Sons of Liberty," an organized minority, in spite of the opposition of Tories, grafters and grovelers before wealth and office, in those days, assisted as they were by the purchased press, suppressing the truth and publishing lies, for the purpose of scaring or humbugging the people. At present all that these American heroes fought for and won is in ex-

treme danger of being lost. To save the Republic we have therefore organized the AMERICAN PATRIOTS—the name alone covers everything sufficiently—and as evidence that we mean business, we incorporated under the laws of the State of California July 14, 1917, and as the objects and purposes of the corporation, filed with the Secretary of State the following statement:

"To defend, maintain and enforce the letter and spirit of each and every provision of the Constitution of the United States, and the Constitution of California.

"To challenge and test in the courts each and every Act of Congress and the executive department which violates said Constitution.

"To test the constitutionality of the so-called draft or conscription act now sought to be enforced.

"To test the constitutionality of every act of the executive and legislative departments forcing any person in the land or naval forces of the United States to render military services in Europe.

"To amend the Constitution of the United States so that war can never be declared, except by vote of at least two-thirds of the registered voters of the United States.

"To amend the Constitution of the United States so as to incorporate therein the initiative, referendum and recall substantially as contained in the Constitution of California.

"Neither profit, nor profit sharing, nor dividends, nor dividend sharing, nor any financial gain, to any of the members, or otherwise,

shall ever be any of the objects of this corporation."

It is plain from the above that members of AMERICAN PATRIOTS must be real, genuine patriots, not humbug or "shoneen." No matter where you or your ancestors were born, if you are now an American citizen and a real genuine patriot you are requested to join us at Room 714 Mechanics Building, Cor. Market and Mason Streets, San Francisco, Cal.

Yours sincerely,

Daniel O'Connell, President.
Margaret Malloy, Secretary.

AMERICAN PATRIOTS,
714 Mechanics Building, San Francisco, Cal.

Please enter our names as members:

Names Addresses

Material Portions of United States Exhibit 3.

ARTICLES OF INCORPORATION

of the

AMERICAN PATRIOTS

KNOW ALL MEN BY THESE PRESENTS:

That we, the undersigned, a majority of whom are citizens and residents of the State of Cali-

fornia, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of California AND WE HEREBY CERTIFY,

FIRST. That the name of said Corporation shall be the AMERICAN PATRIOTS.

SECOND. That the purpose for which it is formed are

To defend, maintain and enforce the letter and spirit of each and every provision of the Constitution of the United States, and the Constitution of California.

To challenge and test in the courts each and every act of Congress and the executive department which violates said Constitution.

To test the constitutionality of the so-called draft or conscription act now sought to be enforced.

To test the constitutionality of every act of the executive and legislative departments forcing any person in the land or naval forces of the United States to render military services in Europe.

To amend the Constitution of the United States, so that war can never be declared except by vote of at least two-thirds of the registered voters of the United States.

To amend the Constitution of the United States, so as to incorporate therein the initiative, referendum and recall substantially as contained in the Constitution of California.

Neither profit or profit sharing or dividends or dividend sharing or any financial gain to any of

the members or otherwise shall ever be any of the objects of this corporation.

THIRD. That the place where the principal business of said Corporation is to be transacted is the City and County of San Francisco, State of California.

FOURTH. That the term for which said Corporation is to exist is fifty years, from and after the date of its Incorporation.

FIFTH. That the number of Directors or Trustees of said Corporation shall be five and that the names and residences of the Directors or Trustees, who are appointed for the first year, and to serve until the election and qualification of such officers, are as follows, to wit:

NAMES	WHOSE RESIDENCE IS AT
DANIEL O'CONNELL	900 Balboa St., San Francisco, Cal.
DAVID J. SMITH	50 Fulton St., San Francisco, Cal.
HERMAN B. SMITH	50 Fulton St., San Francisco, Cal.
JULIA MANLY	SAN MATEO, CAL.
MARGARET MALLOY	SAN MATEO, CAL.

United States Exhibits 10, 12, 19, 22, 24 and 25 are exemption claims. The claims are in substantially the same form and the material portions are as follows:

LOCAL BOARD; for DIVISION NO. ....., CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA.

.....SAN FRANCISCO, CAL.

CLAIM OF EXEMPTION OF MILITARY SERVICE

I, ..., Serial Number ....., not being now, and never having been, in the military or naval forces, or service, of the UNITED STATES OF AMERICA, and not submitting to, or admitting, any jurisdiction in this Board, or any other board, or organization, or official, whatever, to in any degree draft, or conscript, me into the military or naval forces of the United States; but specifically denying any and all such jurisdiction in this or any other Board, or organization, or official, and objecting to any and all such jurisdiction, and for the purpose of resisting any claim that may be made hereafter that my service, or property, or liberty, or life, is being taken from me by due process of law, or any claim that by any act of mine or any other person, or Board, or official, I had in any degree waived any right to question, and defeat, any claim of power, jurisdiction or authority to draft, or conscript me, into the naval or military forces or service of the United States, I make this particular form of claim of exemption at and from the start, setting up a few of the many grounds I have therefor, so that any appearance by me hereafter before any physician, or official, or board, or organization whatever, shall not be construed in any way an admis-

sion of, or submission to, your jurisdiction, or authority, but as merely a matter of courtesy and orderly proceeding for the purpose of calmly and legally presenting at the proper time to the proper courts, to wit: the District Court of the United States, the United States Circuit Court of Appeals, and the Supreme Court of the United States, the constitutionality and lawfulness of any of the proceedings of the past, present or future in enacting or enforcing this draft or conscription law now sought to be enforced, therefore:

I claim exemption from military service on the following grounds, to wit:

I am a resident of .....

1. The act and acts of Congress, and the proclamation of the president of the United States thereunder, and all of the rules and regulations made in the attempt to carry out the said conscription or draft law, are each and all unconstitutional and void, in that the Congress of the United States and the President and Executive Department of the United States have no authority whatever, except that expressly granted to them or each of them by the Constitution of the United States, and any law or act or proceeding taken by said Congress or president or executive department contrary to the prohibitions in said Constitution, are each and all void, especially as the Constitution was framed and adopted for the purpose of protecting the people and the liberties of the people against the encroachments of temporary office holders, and, therefore, said conscription act and law and all said proclamations, rules and regulations proclaimed or announced by the executive department

in carrying out any of the provisions of said draft or conscription law, violate the following provisions of the Constitution of the United States, to wit:

1. The first sentence containing the objects and purposes of the Constitution.

2. Section 8, of Article I, of said Constitution and particularly Subdivisions 1, 11, 12, 14, 15 and 17 of said Section 8.

3. Sections 1 and 2 of Article III of said Constitution.

4. The second paragraph of Article VI of said Constitution.

5. Articles IV, V, VI, IX, X, XIII and Section 1 of Article XIV of said Constitution.

Later on, I shall present in my affidavit, in support of my claim of exemption, a more detailed statement of the facts and particulars upon which the foregoing claim of exemption is hereby made, and for the purpose of laying the foundation for testing all the said rules and regulations, orders, acts, and laws, I am filing with you at this time the foregoing claim of exemption, and whenever there is the slightest danger to the United States or the Constitution of the United States no one will respond quicker or fight better or longer than I will and that without any conscript or draft law, but I am certain that notwithstanding all the humbug and lies published in the newspapers and other

publications of the world, there is not, and cannot be, the slightest danger to the United States, as this war is simply a war of aggression, conquest, and greed, on the part of England and England and her agents have secured a vote of Congress assisting them in this war, which vote was in violation of the Constitution, and will be reconsidered by the next Congress, who will have full power and express directions from the people.

.....

.....

ADDRESS

Material Portions of United States Exhibit 13.

"Eternal vigilance is the price of liberty. Americans wake up, defend your liberties at home. Attend the Declaration of Independence mass meeting, Dreamland Rink, Steiner Street between Sutter and Post, July 3rd, 1917, 8 P. M. (Eve of the Birth of our Liberty).

"Sara Bard Field, Attorney Daniel Yost, Rev. Robert Whittaker, Theodora Pollak, Ferdinand Claudius, J. E. Snyder, Anita Whitney, Rev. W. Short, William McDevitt, Walter Thomas Mills, and other prominent speakers. Also young men of conscription age. Herman B. Smith, Chairman.

"Admission Free. Doors open at 7:30 P. M."

Material Portions of United States Exhibit 14.

SPEECH OF HERMAN B. SMITH, DELIVERED AT DREAMLAND RINK, July 3, 1917.

Now, as a young man, I ask the question: "What about the conscientious objector"? We want to know about him. * * *

On September 1st we are going to have a big lottery in this country. They are going to see which ones of us go over there first to be slaughtered. Now, there are a lot of boys who do not want to go. They think it is murder—they do not know what—they do not know why they should be compelled to go and die "somewhere in France." They would undoubtedly be willing to die in America, or to go and take part in the wars of this country. Now, these boys, Friends, are going to demand that we stand by them. Every one of us here who are above the age must do a share in aiding these boys to stand firm in his conscience, and say he will not go.

President Wilson so far has not announced what he is going to do about the conscientious objector. He has only told us about the registration. * * * These boys are going to say to you, "What are we going to do?" As fathers, mothers, brothers and sisters are we going to be enabled to say, "We do not want you to go." There is an organization throughout the whole nation to see that their fight is taken care of; we want you to help; we have started one in San Francisco here and there are

others being started, and we want you to give us your assistance, and we are telling you we must have money. The Government has asked you to buy Liberty Bonds, finance the war and give and equip our boys to be maimed and killed. But we want to save our boys at home—to save them from going to that hell in Europe. Let us stay here and help them. Any money that you pay to-night after defraying the expenses of this meeting will go to save our boys, so I ask you to give.

Some Material Portions of United States Exhibit 16.

PROCLAMATION AND WAR PROGRAM

The Socialist Party of the United States is unalterably opposed to the system of exploitation and the class rule which is upheld and strengthened by military power and sham national patriotism * * *.

The forces of capitalism which have led to the war in Europe are even more hideously transparent in the war recently provoked by the ruling class of this country * * *.

Our entrance into the European war was instigated by the predatory capitalists in the United States who boast of the enormous profit of seven billion dollars from the manufacture and sale of munitions and war supplies and from the exportation of American food stuffs and other necessaries * * *.

We brand the declaration of war by our government as a crime against the people of the United States and against the nations of the world.

In all modern history there has been no war more unjustifiable than the war in which we are about to engage.

No greater dishonor has ever been forced upon a people than that which the capitalist class is forcing upon this nation against its will.

In harmony with these principles, the Socialist Party emphatically rejects the proposal that in time of war the workers should suspend their struggle for better conditions. On the contrary, the acute situation created by war calls for an even more vigorous prosecution of the class struggle, and we recommend to the workers and pledge ourselves to the following course of action:

1. Continuous, active, and public opposition to the war, through demonstrations, mass petitions, and all other means within our power.

2. Unyielding opposition to all proposed legislation for military or industrial conscription. Should such conscription be forced upon the people, we pledge ourselves to continuous efforts for the repeal of such laws and to the support of all mass movements in opposition to conscription. We pledge ourselves to oppose with all our strength any attempt to raise money for payment of war expense by taxing the necessaries of life or issuing bonds which will put the burden upon future generations. We demand that the capitalist class, which is responsible for the war, pay its cost * * *.

29836

SUPPLEMENTAL

BRIEF

APR 16 1920
JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM—1919.

No. 221.

DANIEL O'CONNELL, et al.,
Plaintiffs-in-Error,
against
UNITED STATES OF AMERICA,
Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

SUPPLEMENTAL OR REPLY BRIEF FOR PLAINTIFFS-IN-ERROR, DANIEL O'CONNELL AND CARL J. F. WACKER.

GILBERT E. ROE,
Attorney for Plaintiffs-in-Error,
Daniel O'Connell and Carl J. F. Wacker,
New York City.

JOSEPH L. TEPPER,
Counsel,
Washington, D. C.

INDEX.

PAGE

Preliminary Statement 1

Point I. The Bill of Exceptions was duly settled and signed and is properly before this court for consideration 2-16

Point II. The new matter which the Attorney General seeks to add to the record by his motion on suggestion of a diminution of the record made on the 11th day of March, 1920, does not materially affect the several assignments of error presented in our main brief 16-36

(1) The Verdict 17

(2) The Court's Charge to the Jury 21

(3) The Evidence 28

Authorities Cited.

PAGE

Act of February 26, 1919, Chap. 48, amending Judicial Code, Sec. 269 ..... 26, 29
August vs. U. S., 257 Fed., 388 ..... 22, 25
Burton vs. Wilmington Ry., 84 N. C., 192 33
Camden Iron Works vs. Sater, 223 Fed., 611 .. 10
Coffin vs. Jones, 11 Pick., 45 20
Cummins vs. U. S., 232 Fed., 844 22
Dalton vs. Gunnison, 165 Fed., 873 10
Davis vs. Patrick, 122 U. S., 138 8
Dealy vs. U. S., 152 U. S., 539 21
DuPont de Nemours & Co. vs. Smith, 149 Fed., 403 .....10, 12
Elmer vs. U. S., 260 Fed., 646 29
Ford vs. State, 5 Okl. Crim., 240 33
Hall vs. U. S., 256 Fed., 748 .....22, 27
Howard vs. Commonwealth, 114 Ky., 372 33
Hunnicutt vs. Peyton, 102 U. S., 333 5
Judicial Code, Sec. 269 26
Koewing vs. Wilder, 126 Fed., 472 .....10, 11
People vs. Arnold, 46 Mich., 268 .....34, 35
Pittsburgh Gas and Coke Co. vs. Goff-Kirby Coal Co., 151 Fed., 466 10
Roberts vs. Bennett, 135 Fed., 748 10
Sorenson vs. U. S., 143 Fed., 820 33
Sparf and Hansen vs. U. S., 156 U. S.,. 51 33, 34, 36
State vs. Collins, 121 N. C., 667 33
State vs. Wakefield, 88 Conn., 164 33
Stokes vs. U. S. (not yet reported) 22
Talbot vs. Press Pub. Co., 80 Fed., 567 ....10, 11
Thompson vs. State, 16 Ga. App., 832 33
U. S. vs. Breitling, 61 U. S., 252 6
Waldron vs. Waldron, 156 U. S., 361 8
Winchester vs. Creary, 116 U. S., 161 33

PAGE

Wolf vs. U. S., 259 Fed., 388 ..... 22, 24
Woods vs. State, 60 S. W., 244 34
Yellow Poplar Lumber Co. vs. Chapman, 74 Fed., 444 10

CASES FROM GOVERNMENT'S BRIEF CITED AND COMMENTED ON.

Armstrong vs. People, 37 Ill., 459 18
Arnold vs. State, 51 Ga., 144 19
Ballew vs. U. S., 160 U. S., 187 18
Com. vs. Judd, 2 Mass., 329 19
Henry vs. Raiman, 25 Penn. St., 354 19
Huff vs. U. S., 228 Fed., 892 19
Jennings vs. Philadelphia, etc., 218 U. S., 255 14
Michigan Ins. Bank vs. Eldred, 143 U. S., 293 15
Missouri K. & T. Ry. Co. vs. Russell, 60 Fed., 501 16
Richmond & D. Ry. Co. vs. McGee, 50 Fed., 906 16
State vs. Yocum, 117 Mo., 622 19
Statler vs. U. S., 157 U. S., 277 18
Texas & Pac. Ry. vs. Volk, 151 U. S., 73 30
Waldron vs. Waldron, 156 U. S., 361 16

Supreme Court of the United States

OCTOBER TERM 1919 No. 221.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Supplemental or Reply Brief for Plaintiffs-in-Error Daniel O'Connell, and Carl J. F. Wacker.

I do not wish to add to the already too voluminous literature of this litigation. But in view of the fact that since the briefs for plaintiffs-in-error have been filed and served herein a motion has been made in this court by the Attorney General on suggestion of a diminution of the record, and also because the brief filed by the Attorney General discusses at considerable length some matters not referred to in the briefs for plaintiffs-in-error, it seems desirable to submit some further suggestions and authorities relating to some of the contentions made by the Attorney General in his brief.

POINT I.

The bill of exceptions was duly settled and signed and is properly before this court for consideration.

The judgment in this case was entered on the twenty-ninth of September, 1917 (Tr. R., 194). The term of the court was extended by Standing Rule Number 9 for a period of three calendar months from the first Tuesday of the month in which the verdict was rendered or judgment entered, for the purpose of making and filing a Bill of Exceptions and of making any and all motions necessary to be made within the term at which the judgment or decree was entered. The effect of this rule was to carry the term, for the purpose of filing a Bill of Exceptions, up to and including the fourth day of December, 1917. There is nothing in the rule which forbids a further extension of the term for any purpose. The Bill of Exceptions it is true was not filed until December 31st, 1917, but the time for filing the same had been duly extended by the orders of the court and while some of these orders were made without notice to the District Attorney all orders were promptly served on the District Attorney after they were made and no objections to the same were ever made by the District Attorney (Tr. R., 174-5, 179-80). These orders were made as follows: On September 29th, 1917, the day the judgment was rendered, the court granted defendants thirty days in which to prepare a Bill of Exceptions; on October 23rd, 1917, a further extension of time was granted to November 15th, 1917; on November 12th, 1917, the court granted an-

other extension to November 27th, 1917; on November 26th, 1917, a further extension of time was granted to and including December 15th, 1917; on December 14th, 1917, the court granted another extension of time to and including December 24th, 1917; on December 24th, 1917 the court granted a further extension of time to and including December 31st, 1917. All of said extensions were for the purpose of preparing the Bill of Exceptions. After the Bill of Exceptions was filed on the 31st day of December, 1917, the United States District Attorney procured an order extending his time to file amendments (Tr. R., 176) and thereafter and on the 30th day of January, 1918, did file his amendments to the proposed Bill of Exceptions (It appears by the record in the mandamus proceedings, if the court takes notice of that record, that these amendments were 357 in number, Mandamus Record, page 9). Defendants thereafter duly filed and served objections to certain of the amendments and the parties apparently being unable to agree upon the same an order was made setting the first day of April, 1918, as the day for hearing said objections and settling the Bill (Tr. R., 176). All the amendments proposed by the prosecution, however. were allowed by the court, which involved striking out large portions of the evidence and proceedings upon trial. This accounts for the confused state of the record. Two omissions are noticeable on page 172. At about the middle of the page a paragraph commences with the words, "which said motion was denied by the court" but the motion itself has been omitted. And immediately after that paragraph the portion of the charge excepted to is omitted and

appears in the certiorari record, pages 7-17. Two motions to strike out evidence appear on pages 88 and 89, and a motion to quash the indictment or direct a verdict of not guilty is set out on pages 94-99, but the exceptions to the overruling of all those motions appear at about the middle of page 94. There are also omissions evident on page 74 in connection with the Cohen and Gambo records.

The prosecution on April first, 1917, for the first time moved to strike out the proposed Bill of Exception as being filed too late (Tr. R., 176). The learned trial judge while delivering an opinion in which he expressed doubt of his jurisdiction to settle the Bill in view of the objections then made (Tr. R., 187-188) did settle it and allowed all the amendments proposed by the prosecution, and the Bill duly signed and certified was transmitted to this Court as part of the record in this case. The Bill of Exceptions was therefore settled in the exact manner desired by the prosecution in accordance with the amendments proposed by it, and no exception was taken by the prosecution to the action of the court in settling and signing the Bill, and no question was reserved by the prosecution concerning said action of the court. From the foregoing statement of facts it seems clear that the objection now made by the Attorney General that this court should not consider the Bill of Exceptions cannot prevail for two reasons; First, by orders of Court duly made and entered the time for filing the Bill of Exceptions was duly extended to and including the date on which the same was filed; Second, the prosecution by filing its amendments to the proposed Bill of Exceptions and procuring the allowance thereof effectually waived any objection that the Bill had not been filed in time.

The trial judge unquestionably had *power* to sign the Bill of Exceptions in the case at bar at the time he did sign it. The only question in the mind of the trial judge as his opinion shows was as to his *power* to sign the Bill of Exceptions at the time in question. A sufficient excuse for the delay in presenting the bill having been shown he exercised his discretion in behalf of the defendants and allowed and signed the Bill. *It must be assumed that sufficient reason was presented to the judge at the time for making each of the orders respectively extending the time to settle the Bill.* Under these circumstances this court will not entertain the objection that the Bill was signed too late, now made for the first time in the brief of the Attorney General, particularly as no exception was taken to the action of the trial judge in signing the Bill, no question reserved concerning his action in so doing, and no motion made by the Attorney General in this court to raise the question.

In Hunnicutt vs. Peyton, 102 U. S., 333, the court after referring to some of the many reasons that may occasion delay in settling Bills of Exceptions said at page 356:

> "For these reasons, the universal practice is to give reasonable time to make up the bills of exceptions and obtain the signature. This is not altering the record, it is completing it. It is not exercising jurisdiction over the case. It is merely putting into form the record statement of what was done before the writ of error was sent down."

This case also holds that the Bill of Exceptions may be signed after the writ of error is sued out.

In United States vs. Breitling, 61 U. S., 252, a Bill of Exceptions was signed and filed by the judge not only after the term but in contravention of the rule of the court and in spite of the objections of opposing counsel. The judge saw fit to attach to the Bill the following explanatory note:

> "During the term of the court, the attorney for the United States presented a bill of exceptions. The Bill was presented on Saturday before the court adjourned, which was on Wednesday. On Monday morning, the bill was handed to the United States attorney, with the request that he submit it to the opposing counsel. On the third day after this, the minutes were signed, and the court adjourned.
>
> I heard nothing further from the bill till the 9th or 10th of May when it was presented by the plaintiff's attorney again, with the written objections of the attorneys of the defendant, that it should be signed after the adjournment. The clerk will subjoin this explanation to the bill of exceptions. John Gayle."
>
> Filed 15th May, 1856.

This court upheld the action of the trial judge in signing the bill. Chief Justice Taney in his opinion said:

> "The objection stated in the note is founded upon a rule of the Circuit Court, which in general terms adopts the practice of the State Courts; and the practice of the State Courts, in relation to exceptions, is regulated by a law of the State, which provides that no bill of exceptions can be signed after the adjournment

ment of the court during which the exception is taken, unless by consent of counsel in writing, when it may be signed within ten days thereafter, except in such cases as is otherwise provided.

But the answer to this objection is, that the statute of Alabama, and the regulation it prescribes to the courts of the State, can have no influence on the practice of a court of the United States, unless adopted by a rule of the court. And it is always in the power of the court to suspend its own rules, or to except a particular case from its operation, whenever the purposes of justice require it. The attention of this court has, upon several occasions, been called to this subject, and the rule established by its decisions will be found to be this: the exception must show that it was taken and reserved by the party at the trial, but it may be drawn out in form and sealed by the judge afterwards. This point was directly decided in the case of Phelps vs. Mayor, 15 How., 260; and again, in Turner vs. Yates, 16 How., 28. And the time within which it may be drawn out and presented to the court, must depend on its rules and practice and on its own judicial discretion. In the case before us, the judge who tried the case deemed it his duty to seal and certify the exception to this court; and under the circumstances stated in the exception and the note, we think he was right in doing so, and that this exception is legally before this court as a part of the record of the proceedings of the court below."

In Davis vs. Patrick, 122 U. S., 138, the Bill of Exceptions was allowed and signed at a term subsequent to that at which the case was tried and one week after the expiration of additional time agreed to between the parties by stipulation. Plaintiff moved to strike out the Bill on the ground that it was not signed in time, but this court, Justice Blatchford, writing the opinion, denied the motion on the authority of the United States vs. Breitling, supra, and allowed the Bill.

In Waldron vs. Waldron, 156 U. S., 361, the facts so far as the Bill of Exceptions is concerned were as follows: Judgment was rendered in June and defendant's time to file his Bill of Exceptions was on motion extended to November first, a date still within the term. On October 6th the parties entered into a stipulation allowing defendant until November 15th to prepare the Bill of Exceptions and providing that plaintiff should have thirty days thereafter to examine it and propose amendments and that within thirty days after that time it should be presented to the Judge for his approval which would require the bill to be presented to the Judge on or about January 15th of the next year, a day long after the expiration of the term. The bill as a matter of fact was not given to plaintiff until after the date agreed upon and was not presented to the Judge until February 21st and upon its presentation plaintiff moved that the Judge should not sign it because the defendant had not filed his bill in the time prescribed by the Judge at the time the appeal was prayed for. The motion was denied and plaintiff duly excepted to the ruling. Mr. Justice White passed on the question at the beginning of his opinion as follows, at page 378:

"The motion to dismiss or affirm is without merit. The signing of the bill of exceptions after the expiration of the term at which the judgment was rendered, was lawful if done by consent of parties given during that term. Hunnicutt vs. Peyton, 102 U. S., 333; Davis vs. Patrick, 122 U. S., 138; Michigan Ins. Bank vs. Eldred, 143 U. S., 293.

The fact that the bill of exceptions was not handed to counsel for defendant on or before November 15, 1890, does not appear of record, and if it did, it would be rendered immaterial by the action of the judge below in settling the bill.

If the bill was not delivered to counsel within the time fixed by the agreement, objection to the failure so to deliver it should have been urged when the bill was settled. And if an objection then taken was overruled, the question of the correctness of such action should have been then reserved. The fact is, that the only reservation made in the settlement of the bill is thus stated in the record: 'Counsel for plaintiff moves that the judge do not sign the same, because the defendant has not filed this bill of exceptions within the time prescribed * * * at the time the appeal was prayed.' This, of course, was not sound, in view of the agreement whereby the time which had been at first fixed was extended. The only question reserved in this connection is accordingly, also, without merit."

The following cases in the United States Circuit Courts of Appeals show that the District Courts

often settle bills of exceptions after the expiration of the term and even after the time has expired fixed by rule, stipulation, or order, for settlement of the bill.

Yellow Poplar Lumber Co. vs. Chapman (C. C. A., 4th), 74 Fed., 444;
Talbot vs. Press Pub. Co. (Circuit Ct., S. D. N. Y.), 80 Fed., 567;
Koewing vs. Wilder (C. C. A., 2nd), 126 Fed., 472;
Roberts vs. Bennett (C. C. A., 2nd), 135 Fed., 748;
Pittsburgh Gas and Coke Co. vs. Goff-Kirby Coal Co. (C. C. A., 3rd), 151 Fed., 466;
Dalton vs. Gunnison (C. C. A., 9th), 165 Fed., 873;
Camden Iron Works vs. Sater (C. C. A., 6th), 223 Fed., 611;
DuPont de Nemours and Co. vs. Smith (C. C. A., 4th), 249 Fed., 403.

In Dalton vs. Gunnison, supra, which was a mandamus proceeding to compel the judge to sign the Bill, the term of court at which judgment was rendered expired May 2nd; before it expired petitioner was allowed by order of the court until July first to file his Bill and before that time elapsed further order was made allowing him until August first. At some date subsequent to August first another order was made allowing him until October first. The Bill as a matter of fact was completed on August 31st and presented to the judge for signature. The judge refused to

sign the bill on the ground that he had lost jurisdiction to do so for the reason that the Bill was presented to him during an extension of time allowed after the previous extension had expired. Mandamus was granted however compelling the judge to sign the Bill.

In Koewing vs. Wilder, supra, it was held that an order which extended the time for signing the bill of exceptions to a date beyond the term operated as an extension of the term itself for the purpose of signing the bill.

In Talbot vs. Press Publishing Company, supra, an application was made for an order *nunc pro tunc* extending plaintiff's time to make and file his bill of exceptions. The term in which judgment had been rendered had expired and an extension of time granted within the term had expired, and plaintiff had obtained no stipulation of counsel nor order of court extending the time. Defendant objected that the court had no power to further extend the time, but Lacombe, Circuit Judge, said at page 568:

> "Reference is made to Muller vs. Ehlers, 91 U. S., 249; Bank vs. Eldred, 143 U. S., 293, 12 Sup. Ct., 450; and Ward vs. Cochran, 150 U. S., 597, 14 Sup. Ct., 230, and it is urged that the court has no power, after a term has expired, to extend the time for making, etc., bill of exceptions, even within the period allowed by statute for suing out a writ of error. Inasmuch as the exceptions were all taken, noted by the judge, and reduced to writing at the trial, and the bill of exceptions is merely the convenient form in which they are reproduced for the court of review, such a hide-bound prac-

> tice would often work great injustice. The decision in Chateaugay Ore & Iron Co., 128 U. S., 544, 9 Sup. Ct., 150, has recognized a more liberal rule as applicable in this district, where, as the Supreme Court says, by Mr. Justice Blatchford: 'The rules of the Circuit Court clearly contemplate proceedings to perfect a bill of exceptions within the time limited by those rules, without reference to the expiration of a term.' Since those rules expressly contemplate an enlargement of the time by the judge in a proper case, there is no reason why enlargement should not be made in this case, although the trial and judgment term has expired. The time to make, file and serve bill of exceptions is extended to and including May 12th."

In DuPont de Nemours & Co. vs. Smith, supra, a motion to dismiss a writ of error was made on the ground that the bill of exceptions was not presented within the time fixed by the order of the District Court, and the further facts are thus stated in the opinion at page 404:

> "* * * On the 27th of August defendant's attorney wrote to the plaintiff's attorney, inclosing a proposed order for an extension of 10 days after the adjournment of the term of the court. Having received no answer, on September 3rd he wrote another letter, requesting that consent be indorsed on the proposed order. No reply was made to either of these letters; the plaintiff's attorney in his affidavit saying that the letters were not received, and defendant's attorney saying that he inferred from the failure to respond that the plaintiff's

attorney had consented to the enlargement of the time. After the term had ended, on the 2nd of October, 1917, the bill of exceptions was presented to the district judge and signed by him in the presence of counsel for the plaintiff. * * * it is settled beyond question, however, that a bill of exceptions may be allowed by consent after the time fixed by order or rule of the District Court, and after the expiration of the term at which the case was decided. Waldron vs. Waldron, 156 U. S., 361, 15 Sup. Ct., 383, 39 L. Ed., 453; Jennings vs. Philadelphia, etc., Co., 218 U. S., 255, 31 Sup. Ct., 1, 54 L. Ed., 1031. It follows from this holding that the District Court does not completely lose its jurisdiction after the expiration of the term; for if it did, consent would not avail. The case first cited lays down the rule that if the bill of exceptions be allowed after the time fixed, either by consent or by an order of the court, and after the expiration of the term, it will be sufficient unless the point was expressly saved by objection made at the time to the allowance.

In this case, after the expiration of 30 days fixed by the order, and after the expiration of the term, the bill of exceptions was allowed by the District Court, and it does not appear in the record that any objection was made by counsel for defendant-in-error to the allowance. Unless, therefore, the case of Waldron vs. Waldron, supra, has been overruled, the defendant-in-error cannot avail himself of the failure of the counsel for the plaintiffs-in-error to have the bill of exceptions signed within 30 days and before the expiration of the

term. The authority of the Waldron case to this effect was expressly recognized in Old Nick Williams Co. vs. United States, 215 U. S., 541, 30 Sup. Ct., 221, 54 L. Ed., 318. These cases are not overruled, either expressly or impliedly, by Jennings vs. Philadelphia, etc., Co., supra. * * *

The evidence of consent to the allowance of the bill of exceptions and waiver of the time is very strong. The record does not show that any objection was made. The signing of the stipulation by counsel for plaintiff as to what should constitute the record, without the reservation of any technical rights, goes far to show waiver of all irregularities that were not jurisdictional. The case is thus even stronger against the defendant-in-error than was the case of Waldron vs. Waldron, supra.

We have the strong conviction that the extreme penalty of dismissal of a cause without a hearing on the merits should not be imposed upon a litigant for the inadvertence of his counsel, except in flagrant cases of neglect, or where the court is compelled by statute or clearly established practice to do so. In such cases orderly procedure may be well maintained by the infliction of the penalty of costs on the defaulting party or his attorney."

An examination of the cases cited by the Attorney General, shows that they do not sustain the proposition for which they are cited.

Jennings vs. Philadelphia, Baltimore and Washington Rwy. Co., 218 U. S., 255, came up from the Court of Appeals of the District of Columbia and

merely involved the construction of Common Law, Rule 55. In that case no order was made extending the term and the rules substantially provided that it could not be extended longer than 38 days. Neither was any order made extending the time within which the bill could be settled. It was erroneously assumed by the plaintiff that the effect of Rule 55 was automatically to extend the term for the period of thirty-eight days from the trial for the purpose of signing the bill of exceptions. This was held to be an erroneous construction. It seems also that an appeal had been allowed and perfected as a result of which the trial court had lost all control over the record. It is not suggested that the court could not by order have extended the term at least for the thirty-eight days after judgment permitted by rule, or that the power of the trial judge over the record could not have been extended by consent or order, for it says that in order that the bill of exceptions should be allowed "after the close of the term and after the court had lost all judicial power over the record, there should be express consent or conduct which should equitably estop the opposing party from denying that he had consented."

In Michigan Insurance Bank vs. Eldred, 143 U. S., 293, the bill of exceptions had been signed and settled within the term and within the time allowed therefor, but about six months thereafter and only a few days before the case came on for argument in this court plaintiff obtained an order from the Circuit Judge amending the bill of exceptions and adding thereto two exceptions *nunc pro tunc* as of the time when the bill was originally settled. It was only the matter contained in these two exceptions that this court refused to consider, deny-

ing a writ of certiorari to bring up the additional matter.

In Missouri K. & T. Ry. Co. vs. Russell (C. C. A., 8th), 60 Fed., 501, the facts are not at all analogous to the present case and the element of consent was totally lacking.

In Richmond and D. Ry. Co. vs. McGee (C. C. A., 4th), 50 Fed., 906, the trial judge never signed the bill of exceptions at all. And in Waldron vs. Waldron, supra, the bill was held to be properly before this court.

The foregoing are all the cases cited by the attorney general and it is obvious that they do not support his contention that the bill of exceptions can not be considered by this court.

POINT II.

The new matter which the attorney general seeks to add to the record by his motion on suggestion of diminution of the record made on the 11th day of March, 1920, does not materially affect the several assignments of error presented in our main brief.

On the 11th day of March, 1920, the Attorney General moved in this court for a writ of certiorari on suggestion of diminution of the record by which he sought to have added to the record (1) a photostatic copy of the verdict, (2) a transcript of the stenographer's minutes relative to the Cohen and Gambo cases, and (3) a transcript of the entire charge of the court. Assuming that the new matter submitted with this motion will be accepted as

a return to the writ, it only remains to examine it briefly to discover that it does not materially affect the case.

I. *The verdict:*

The photostatic copy of the verdict submitted merely shows what was obvious without it that the verdict was prepared by filling in a form. The verdict does show, however, that the jury carefully filled in the names of all the defendants, even though it was necessary to write in some of the names after the blank space left for names had been filled, and also that the jury carefully refrained from filling out the blanks in the verdict which would indicate on which counts of the indictment the defendants were found guilty or not guilty. The care with which the names of the defendants were written in the verdict makes it hard to believe that the failure to state on which count of the indictment the defendants were found guilty and on which count they were found not guilty was unintentional. If the photostatic copy of the verdict throws any light on the question at all, it tends to support the theory that the jury were not agreed upon which, if either, of the counts the defendants should be found guilty. In any view, however, the matter is left exactly where it was in the beginning. The intention of the jury cannot be determined from the verdict rendered. It is a matter of pure speculation for the court to attempt to say what the jury intended to do. In all the many cases cited in the brief of the Attorney General, there is not one in which the verdict bears even a remote resemblance to the verdict in the present case or in which any principle is laid down which would

justify a court in sustaining a judgment entered upon the verdict in this case.

A glance at the verdicts passed upon in the cases referred to by the Attorney General in his brief on pages 11 and 12, will show that any reasoning which may have been found necessary to sustain them would have no application to a verdict so totally defective as the one in this case.

In Statler vs. U. S., 157 U. S., 277, the verdict was "guilty on the first count for having in his possession counterfeit minor coin. Not guilty as to the second and third counts." Here, of course, there was no doubt as to the count on which the jury intended to find the defendant guilty and the descriptive words "for having in his possession counterfeit minor coin" were held to be unnecessary and merely superfluous.

In Ballew vs. U. S., 160 U. S., 187, the sufficiency of the verdict was not brought into question nor included in the assignments of error. Its form was as follows:

> "We the jury find the defendant guilty this twenty-fourth day of October, 1894."

Obviously this was a general verdict of guilty on the two counts of the indictment and was so treated by the court. The case has no bearing on the question now presented.

In Armstrong vs. The People, 37 Ill., 459, the jury were required in case they found the defendant guilty to fix the term of imprisonment. When they brought in their verdict, however, they not only fixed the term of imprisonment but added a fine as well. This was held not to invalidate the verdict and that the fine could be disregarded as surplusage.

In State vs. Yocum, 117 Missouri, 622, the indictment was in two counts, one for rape and the second for a[illegible]ult with intent to rape. The jury brought in a verdict of "guilty of an assault to commit rape." This was held to be a good verdict as to the second count and that the word "intent" could be supplied by a reference to the indictment.

In Arnold vs. State, 51 Georgia 144, the indictment was apparently in one count only and was for assault with intent to murder by shooting. The verdict was "guilty of shooting, not in his own defense, and we recommend him to the mercy of the court." This was held good as the words "without justification" could be implied by reference to the indictment.

Henry vs. Raiman, 25 Penn. St. 354, was a civil action and the verdict read, "We find for plaintiff, by paying back the purchase money." This was held sufficiently definite as the amount of purchase money to be paid back could be made certain by reference to a contract which was incorporated in and made a part of the record.

In Huff vs. U. S., 228 Fed., 892, the indictment was only in one count and the verdict was "guilty of conspiracy," and this was held good as referring to the conspiracy charged in the indictment.

In Commonwealth vs. Judd, 2 Mass., 329, the indictment was in three counts, the first of which charged a conspiracy to make spurious indigo with the intent to sell it as genuine at public auction. One of the other counts charged that it had been fraudulently sold at public auction. The verdict read: "Guilty of a conspiracy to make base and spurious indigo, with a fraudulent intent to sell the same as good and genuine indigo; but they do not find that the same was sold at public auction"

(page 334)). The court said (page 336) that this was sufficient to constitute a good verdict of guilty on the first count but that it followed as a matter of course that they must be acquitted on the other two counts.

In as much as the Attorney General has cited the above early Massachusetts case, we call the court's attention, in addition to the cases already cited by us in our main brief, to the following case,

Coffin vs. Jones, 11 Pickering, 45.

This was an action on a bond. The defendant pleaded three defenses (1) non est factum (2) solvit ad diem (3) solvit post diem. The jury brought in a verdict as follows:

> "Defendant is not indebted to the plaintiff in the manner and form as alleged in the writ and declaration."

The court in granting a new trial, wrote a follows, at page 48:

> "Now we think it does not appear, in the present case, that the jury were agreed as to any of the issues, for they might have been divided in opinion as to each, and yet have agreed in the verdict returned. Some of the jury for instance might have been of the opinion that the deed had not been executed by the defendant, or that it had been improperly altered, but that no payment had been made; while others might be satisfied with the evidence of the execution of the deed, and also of

the payment. If the jury were thus divided in opinion, they could not agree on either of the issues; yet they would all agree that the defendant was not indebted. It cannot therefore, be ascertained by the terms of the verdict, that the jury agreed as to any of the issues; so that the verdict is substantially defective and uncertain. The issues are not found directly nor by necessary implication."

See also Dealy vs. U. S., 152 U. S., 539, 542.

The foregoing are all the cases cited by the Attorney General and it is obvious that they furnish no authority for upholding the verdict in the present case. We must, moreover, assume that the learned Attorney General has cited all the cases which he claims support his contentions. So it is clear that there is no case to be found which is authority for sustaining the verdict in this case.

2. *The Court's Charge to the Jury:*

We believe that an examination of the entire charge of the learned trial judge in the Attorney General's motion papers on suggestion of diminution of the record, only emphasizes the errors therein. We simply ask this court to read that charge beginning near the top of page 26 and ending near the top of page 34 of the motion papers of the Attorney General submitted on motion for writ of certiorari on suggestion of diminution of the record. When the state of the public feeling at the time this trial occurred is considered, it is too plain for argument that the language of the charge referred

to could hardly *fail to* result in a conviction. The charge will be searched in vain for a statement of any evidence favorable to the defendants or tending to support their contentions or their theory of the case. In many cases where the charge was less objectionable than in the case at bar, reversals have been ordered. See

Stokes vs. U. S. (C. C. A., 8th). Opinion filed March 9, 1920;
Wolf vs. U. S. (C. C. A., 8th) 259 Fed., 388, 394;
Elmer vs. U. S. (C. C. A., 8th) 260 Fed., 646, 649;
August vs. U. S. (C. C. A., 8th) 257 Fed., 388;
Hall vs. U. S. (C. C. A., 4th) 256 Fed., 748;
Cummins vs. U. S. (C. C. A., 8th) 232 Fed., 844, 846.

All of the above cases, except the last, were on indictments brought for violations of the Espionage or Draft acts.

In Stokes vs. U. S., supra, The Circuit Court of Appeals reversed the judgment of conviction on the ground that the trial judge had not stated the case fairly in his charge and that among other things, he had laid stress upon evidence which favored the government to the exclusion of that which might favor the defense. The remarks of Sanborn, Circuit Judge, in his opinion, are peculiarly applicable to the case at bar. He said:

"In the consideration of the question in any case, and especially in the case in hand,

the time of, and the circumstances and atmosphere surrounding the trial, as they are revealed by the record or as they are influenced by facts known of all men and the real substantial effect upon the jury of the action of the trial court, are the decisive conditions by which the fairness of the trial must be tested.

The acts and intents charged to the defendant in the indictment were unpatriotic and repulsive to all loyal citizens. They were that she had intentionally endeavored in the manner stated in the indictment to obstruct the prosecution of the war which they were striving and sacrificing to carry on. The trial was in the midst of that war, when patriotic men were particularly impatient of every interference and of every attempt to interfere with or cripple the universal efforts to win that war, efforts in which not only the armed forces but all the people of the nation shared in various ways. * * * It is apparent that at such a time and under such circumstances the task of conducting a fair trial of one thus accused of intentionally attempting to obstruct the universal efforts of the people, was unusually difficult, that extraordinary coolness, care and impartiality were indispensible to prevent the patriotic fervor of the jury from usurping the place of that considerate judgment which it was their duty to exercise. * * *

In the treatment of the main issues on trial, as well as the side issues, the court sometimes stated in an impressive manner, the positions of the Government, reviewed and summed up the evidence it had introduced in support

thereof, but merely told the jury that they would remember and consider the denials or explanations of the defendant or stated the evidence in her behalf with less particularity than was used in the statement of the evidence for the Government or omitted reference to it. * * *

With the exceptions of the rulings which have been discussed, its declarations of the law in its charge were clear and correct, though sometimes blended with comments on and discussions of the facts which made it somewhat difficult to separate the one from the other, and when the entire charge is considered in the light of the time and circumstances surrounding the trial, of the extended discussion in the charge of the many side issues which crept into the case and of the other characteristics of the charge to which attention has been called, this court is unable to resist the conclusion that the patriotic zeal of the court below led it to place too heavy a burden upon the defendant in her endeavor to meet the evidence which the Government produced against her and that the cause of the administration of justice will be served by another trial of this case."

In Wolf vs. U. S., supra, a conviction was also reversed and we find in the opinion of the Circuit Court of Appeals the following (page 394):

"Assignments fourteen and fifteen relate to language used in the charge which defendant claims tended to inflame and divert the jury.

The language was used by way of illustration and explanation and ordinarily would have been entirely proper. However, it covered certain situations shown in the evidence which were not the particular ones covered by the indictment—notably the so-called "flag incident." We think the criticisms well taken. The greatest danger to justice from a jury is through a confusion of the real issues in the case. This is peculiarly true when the times or circumstances or character of crime are such as to make jurymen lose sight of the questions of fact actually involved. It is natural in time of war when patriotic sentiment is high, that it is particularly difficult to secure a fair trial for men accused of crimes connected with the war. At such times the task of the court becomes especially difficult and requires great care to prevent miscarriage of justice. These are practical considerations which must be constantly borne in mind, or the verdicts of juries in such cases will mistakenly become expressions of their hatred for unpatriotic acts in general, instead of their careful judgment on the facts shown by the evidence in the particular case. Patriotism must not become even innocently, a cloak for injustice. The right of an accused in the courts of this nation to a fair trial must not vary with the character of the crime. The variation permitted is in the punishment, but that comes only after a fair trial."

In August vs. U. S., supra, although no exception had been taken to certain remarks of the Dis-

trict Attorney which tended to inflame the minds of the jurors, the Circuit Court of Appeals nevertheless reversed the judgment of conviction and held that it was its duty to do so under Section 269 of the Judicial Code, as amended by the Act of February 26, 1919, Chapter 48, 40 Stats. at L. page 1181, which reads as follows:

> "All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not effect the substantial rights of the parties."

The following is from the opinion (page 392):

> "We think whatever may be our power otherwise, or our inclination to exercise it, the late amendment to Section 269, Judicial Code (Act March 31, 1911, c. 231, 36 Stat. 1163, as amended by Act, February 26, 1919, c. 48) fully authorizes and commands us to look to the entire record before the court and render judgment without regard to the technical error of the want of exceptions to the remarks of counsel."

After referring to the summing up of the District Attorney, the most objectionable feature of

which was that he said that the report of the verdict which would be rendered by the jury would be sure to reach the ears of our enemies in Europe and would be regarded by them as the pulse beat of this country, the opinion proceeds as follows, at (page 393):

> "The case was tried on March 5, 6, 7 and 8 1918. On these dates it was not necessary to inflame the passions of jurors by talking about the enemies of our country, rather was it time to caution jurors against allowing their prejudices and patriotism from swaying their judgment. The language used speaks for itself. It must have produced a situation in the minds of the jurors that destroyed a calm consideration of the rights of the defendant. The U. S. cannot afford to conivct her citizens in this manner."

In Hall vs. U. S., supra. the court said. at page 752:

> "In a time like this, when patriotism is at a high pitch, and many people have to a certain extent lost their mental poise, courts and jurors should be extremely cautious when required to pass upon the rights of an individual charged with an offense affecting the welfare of the Government."

The record shows the precipitation with which the defendants were rushed to trial in this case. They were indicted on the 7th day of September, 1917 (R., 6). A demurrer was interposed on the 11th day of September (R., 16), which

raised many serious constitutional questions at that time undecided. The demurrer was overruled on the same day, September 11th (R., 16) and the defendants were ordered to trial. The trial commenced on September 12, 1917.

The arguments of the District Attorney are not preserved in the record but his remarks during the trial which were upheld by the court (R., 161, 164, 165; Attorney General's motion papers 8, 9, 10, 13), and also the remarks of the court during the trial as well as the charge of the court (R. C., 15; Attorney General's motion papers, pages 8, 9, 10, 13, 40), and rulings throughout the trial, discussed in our main brief, show that the trial was conducted in a way to arouse the passions and appeal to the patriotism of the jury in a manner which at that particular time could hardly have failed to have prejudiced the case of the defendants.

3. *The evidence:*

The admission in the brief of the learned Attorney General relating to the date of the alleged conspiracy, materially simplifies the consideration of the errors arising on the admission of evidence. On page 15 of the Attorney General's brief, he says:

> "The conspiracy, that is, the common concert or combination, had its basis in the organization and actions of an association of persons called, "The American Patriots."

Again, at page 47, referring to the Smith brothers activities on June 2nd and July 3rd, the Attorney General says:

"While these acts took place prior to the actual formation of the conspiracy, viz., July 12, when the association called 'The American Patriots' was formed," etc.

This admission of the Attorney General merely recognizes the fact established by the evidence without dispute in the case that no claim can be fairly made of the existence of any conspiracy prior to July 12, when the organization known as the American Patriots was first launched. It follows from this, of course, that the admission against all defendants of the evidence of events prior to that date including the speech of Herman B. Smith made on July 3rd, and the evidence relating to the circulars and the distribution thereof on June 2nd, was erroneous, and from its nature this evidence could not fail to be very prejudicial to each of the defendants.

The learned Attorney General in his brief at pages 49 and 50, practically admits that the admission of this evidence would have been error calling for reversal if the court had been asked to limit its application to the particular defendants concerned therein and had refused to do so, but it is argued by the Attorney General that because of this technical failure on the part of the defendant's attorney in the court below to make his objection more specific the judgment of conviction should not be reversed. It would seem clear, whatever may have been the rule before, that the act of February 26, 1919, Chap. 48, 40 Stat. at L., page 1181, quoted supra, makes it the duty of this court to disregard the technical error or defect, if there were one, on the part of defendant's counsel in

not more specifically objecting to the evidence in question or moving to limit its application.

The learned Attorney General at page 50 of his brief cites a number of cases in an effort to sustain his highly technical contention. I have examined these cases but they fail altogether to sustain his contention. The cases he cites do not deal with the improper admission of evidence. They relate to the judge's charge to the jury and hold that an exception to the mere omission on the part of the judge to charge on some particular point is not open to review unless a request to charge has been made. But that this rule is not intended to apply, where the trial judge has improperly instructed the jury to the prejudice of one or more of the defendants, is clear from the first case cited by the Attorney General, Texas & Pacific Railway against Volk, 151 U. S., 73, 78 which relies upon and quotes from an opinion of Mr. Justice Story as follows (page 78):

> "It is no ground for reversal that the court below omitted to give directions to the jury upon any points of law which might arise in the cause where it was not requested by either party at the trial. *It is sufficient for us that the court has given no erroneous directions.* If either party deems any point presented by the evidence to be omitted in the charge, it is competent for such party to require an opinion from the court upon that point. If he does not, it is a waiver of it Pennock vs. Dialogue, 2 Peters, 1, 15" (Italics ours).

That these cases have no bearing on the situation presented by the erroneous admission of evi-

dence in the case at bar will be manifest when we consider the circumstances and the manner in which the evidence was admitted. There is no evidence anywhere in the record tending to establish any combination between the defendants for any purpose prior to July 12th, 1917; so clear is this that the Attorney General admits it repeatedly in his brief and refers to July 12th as a matter of course as the date of the inception of the alleged conspiracy. Under these circumstances, when O'Connell moved to strike out the evidence composed of the Socialist Party circulars and all the evidence with relation to their seizure on June 2, 1917 (R., 88), and all the evidence of the speech of H. B. Smith on July 3rd (page 89) on the ground that it had not been connected with the other defendants, it become the duty of the court to rule as a matter of law that the evidence had failed to establish any combination between the defendants prior to July 12th and therefore to grant the motions, and either to strike out the evidence altogether, or at least to very carefully limit it in its effect to the Smith brothers.

O'Connell duly excepted (page 94) to the overruling of these motions and in his motion to quash the indictment or direct a verdict of not guilty made at the same time with the other motions, he expressly called the court's attention to the fact that there was no evidence in the case tending to show any conspiracy (R., 98-99). The court, however, to the great prejudice of the other defendants, denied all the motions and expressly ruled that the evidence had been connected and that it was for the jury to decide whether or not there was a conspiracy in existence on the earlier dates of June 2nd and July 3rd.

The following is from the colloquy between the court and counsel at the time of the overruling of the motions:

"The Court: * * * Now, it is not at all essential that any means employed by any one of the defendants, if there was a conspiracy, which is for the jury to find, it is not at all material from what source any of the propaganda or means that might be disseminated by defendants among the public for such purpose would come. * * * (R., 88).

Mr. O'Connell: If it is connected, if your Honor please.

The Court: That is just what I passed upon. I think the evidence here is sufficient to connect it. * * * I am talking about what the evidence tends to show. * * * If there is evidence which tends to show that one of the defendants during the existence of the conspiracy, if the jury shall find that one was in existence, had to do with the literature of this kind for the purpose of aiding or assisting in its distribution, or independently for himself, distributed it and it was of a character that might further the purposes alleged to have been the object of the conspiracy, it is perfectly competent.

Mr. O'Connell: My objection, of course, was that it had not been connected (R., 89) * * *

The Court: * * * I am perfectly satisfied, and I do not think that argument could change my view, that there is evidence in the case which I would be bound to say to this jury, if they believed it to the extent that I

shall instruct they must believe it, in order to base a verdict upon it, that would justify them in finding the averments in the indictment true" (R., 91).

The refusal to strike out or limit the evidence in question was a serious prejudicial error which the court made doubly so when in its charge to the jury it singled out portions of H. B. Smith's July 3rd's speech and emphasized them against all of the defendants (Attorney General's motion papers 32, 33). Referring to this speech, the court said (Attorney General's motion papers, 33):

"It was therefore wholly unjustified for any innocent purpose and was not protected by the right of free speech or otherwise and *you have the right to so consider it in determining the defendants' purposes.*" (Italics ours).

Sparf & Hansen vs. U. S., 156 U. S., 51, 56;
Winchester vs. Creary, 116 U. S., 161, 166;
Sorenson vs. U. S. (C. C. A., 8th), 143 Fed., 820, 821;
State vs. Collins, 121 N. C., 667, 28 S. E. 520;
Burton vs. Wilmington Railway, 84 N. C., 192, 195;
Howard vs. Commonwealth, 114 Ky., 372, 70 S. W., 1055;
State vs. Wakefield, 88 Conn., 164;
Thompson vs. State, 16 Georgia Appeals, 832, 84, S. E., 591;
Ford vs. State, 5 Okl. Crim., 240, 114 P., 273;

Woods vs. State, 60 S. W., 244;
People vs. Arnold, 46 Mich., 268, 277;

In Sparf & Hansen vs. U. S., supra, Mr. Justice Harlan in his opinion said (pages 56, 57, 58):

"But the confession and declarations of Hansen to Sodergren after the killing of Fitzgerald were incompetent as evidence against Sparf. * * *

The objection to the question, in answer to which the declarations of Hansen to Sodergren were given, was sufficiently specific. The general rule undoubtedly is that an objection should be so framed as to indicate the precise point upon which the court is asked to rule. It has, therefore, been often held that an objection to evidence as irrelevant, immaterial, and incompetent, nothing more being stated, is too general to be considered on error, if any possible circumstances it could be deemed or could be made relevant, material, or competent. But this principle will not sustain the ruling by which the declarations of Hansen, made long after the commission of the alleged murder, and not in the presence of Sparf, were admitted as evidence against the latter. *In no state of case were those declarations competent against Sparf. Its inadmissibility as to him was apparent. It appeared upon the very face of the question itself"* (pages 56-57). * * *

"For the error of the court in not sustaining the objection referred to so far as it related

to Sparf, the judgment must be reversed as to him" (page 58).

In People vs. Arnold, supra, Justice Cooley, in referring to the admissions by one conspirator made after the commission of the joint offense, said (page 277):

> "They are admissible against the party making them and the court must protect the other by cautioning the jury not to permit the confession of his alleged associate to perjudice him."

The fact that O'Connell at the close of the charge to the jury asked the court to instruct that Smith's speech could not be considered against the other defendants unless there was a conspiracy at that time and the court stated that he so ruled, does not touch the point (Attorney General's motion papers, page 41). The court had already held as we have seen that there was evidence from which the jury could find the existence of a conspiracy as early as June 2nd and July 3rd. That is the error which permeates the entire case, for as the Attorney General now admits the conspiracy, if there was one, was not formed prior to July 12th.

So also it is conclusively established that the Smith Brothers withdrew from the "American Patriots" July 17th (R., 143, 152) and thereafter had nothing to do with its activities or with any of the defendants. The conspiracy if there ever had been one had ended so far as they were concerned. What the other defendants did after that time was no more admissible against them than

were their acts prior to the conspiracy admissible against the others.

In Sparf and Hansen vs. United States, 156 U. S., 51 supra, it is said at page 56:

> "What Hansen said after the deed had been fully consummated, and not on the occasion of the killing and in the presence only of the witness, was clearly incompetent against his co-defendant Sparf, however strongly it tended to connect the latter with the commission of the crime."

This shows how illusory was the whole theory of conspiracy in the case. There were millions of people in the country who were opposed to the draft law, and there were citizens in every part and section of the country who made plans or took steps to have it declared unconstitutional. They could all have been joined in a single indictment for conspiracy with as much propriety as the defendants were joined in this case.

It is respectfully submitted that the judgment should be reversed.

GILBERT E. ROE,
Attorney for Plaintiffs-in-Error,
Daniel O'Connell and Carl J. F. Wacker,
New York City.

JOSEPH L. TEPPER,
Counsel,
Washington, D. C.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1918

No. 697

DANIEL O'CONNELL, DAVID J. SMITH, HERMAN B. SMITH, CARL J. F. WACHER, THOMAS CAREY and E. R. HOFFMAN,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF ON BEHALF OF THE PLAINTIFFS IN ERROR, THOMAS CAREY AND E. R. HOFFMAN.

The plaintiffs in error, Carey and Hoffman, desire to draw to the attention of the Court a plain error appearing upon the record in the above entitled cause, which has not been assigned as error.

The verdict in this cause which appears on page 32 of the transcript of record is as follows:

"(VERDICT.)

"We, the Jury, find Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacher, Thomas Carey, and E. R. Hoffman the defendants at the bar, Guilty on the.....Count of the Indictment, and.....on the.....count of the Indictment.

THOMAS H. HASKINS, Foreman."

The minutes of the trial court as reported at pages 31 and 32 of the transcript of record show the verdict in exactly the same terms.

Argument.

Counsel for these plaintiffs in error respectfully contends that this verdict is so absolutely uncertain as to make it impossible to base a judgment thereon.

There are two counts in the indictment charging separate and distinct offenses, and it is contended that the verdict is not direct and certain enough to state with certainty upon which count of the indictment, if either, the defendants were convicted.

It is unnecessary for counsel to cite authorities, to the point that the verdict must be direct and certain enough to enable the defendants to interpose a plea of once in jeopardy to a subsequent prosecution for the same offenses, and it is contended most strenuously that the verdict is not

sufficiently certain to enable these plaintiffs in error to do so.

This matter seems to counsel for said plaintiffs in error to be sufficiently important to engage the attention of this Court, and it is respectfully submitted that the verdict is so defective in every particular that the judgment entered thereon should be set aside.

Dated, San Francisco,
March 8, 1920.

Respectfully submitted,

T. C. WEST,
Attorney for Plaintiffs in Error, Thomas Carey and E. R. Hoffman.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

DANIEL O'CONNELL ET AL., PLAINTIFFS IN error,
v.
THE UNITED STATES OF AMERICA.
} No. 221.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

MOTION OF THE UNITED STATES FOR A DIMINUTION OF THE RECORD.

Now come the United States of America by Alex. C. King, their Solicitor General, and move the court for a certiorari for a diminution of the record in the above-entitled cause for the following reasons and in the following respects:

On June 2, 1919, the plaintiffs in error herein moved for a diminution of the record in respect of the admission in evidence against the plaintiffs in error by the trial court of the record in two selective draft cases, styled the *Cohen* and *Gambo Cases*, in which the plaintiff in error, O'Connell, appeared as counsel for Cohen and Gambo, respectively, and in respect of certain portions of the charge of the trial court to the

jury to which it was claimed exception had been taken by the plaintiffs in error.

On June 9, 1919, the last day of the October, 1918, term, this court granted said motion without prejudice and with the provision that the excerpts quoted in the motion of the plaintiffs in error should be taken as a return to the writ. At the same time the plaintiffs in error filed a motion for leave to file amended assignments in error in which, for the first time, they assigned as error the admission of said records in the *Cohen* and *Gambo Cases* and the said portions of the charge of the trial court. These assignments of error also for the first time assigned as error the form of verdict rendered in the cause. On June 9, 1919, the consideration of said motion was postponed to the hearing on the merits.

Subsequently, upon November 25, 1919, and in December, 1919, the plaintiffs in error filed briefs in the said cause in which they claimed with great earnestness that the verdict of the jury was void; that the evidence relative to the *Cohen* and *Gambo Cases* had been improperly admitted in evidence over their objection and exception; that they had excepted and called the trial court's attention to the portions of the charge quoted in the motion to diminish the record which were claimed to be erroneous; and that the alleged errors in said portions of the charge had never been corrected by other portions of the charge.

In order to meet these claims, which were not made until after the beginning of the October,

In the District Court of the United States

IN AND FOR THE

Northern District of California

FIRST DIVISION

The United States of America,

vs.

Daniel O'Connell, et al

No. 6220

We, the Jury, find Daniel O'Connell - David J. Smith - Norman B. Smith - Earl J. F. Washey - Thomas Carey and E. R. Hoffman, the defendants at the bar, Guilty on the

count of the Indictment, and on the

count of the Indictment.

Thomas H. Haskins

Foreman.

Crim. 221—6-20-14—100.

166281—20. (To face page 3.)

1919, term, it is deemed essential that this court, if it should be of the opinion that the matters referred to in the motion to diminish the record and in the amended assignments of error are properly before it, should have before it the true and entire record of the matters complained of by the plaintiffs in error, and this motion is made for that purpose.

The portions of the record which the United States desire to have certified to this court are as follows:

(1) A photostatic copy of the verdict as actually returned, which faces this page.

(2) A certified transcript of the stenographer's notes of the actual proceedings relative to the admission of the records in the *Cohen* and *Gambo Cases*, which is as follows:

In the District Court of the United States for the Southern Division of the Northern District of California.

UNITED STATES OF AMERICA
vs.
DANIEL O'CONNELL, DEFENDANT.

No. ——
Vol. ——

September 18, 1917.

REPORTER'S TRANSCRIPT.

September 18, 1917.

Mr. PRESTON. We offer in evidence, if your honor please, the records of this court in two cases. I understand the clerk has not made up the judgment

roll, but the judgment is here in the minutes, in two cases involving the violation of the draft act, which Mr. O'Connell defended, and they were both convicted in this court and sentenced on June 27, 1917, and there have been no steps taken to test the law. We offer those records in evidence at this time. The first is *United States* v. *Samuel Cohen*, No. 6122, convicted for violation of the act of May 18, 1917, and the judgment entered on the 27th day of June, 1917, imposing, after a verdict of guilty, a county jail sentence of 10 days. And also the case of *United States* v. *Gambo*, No. 6123, convicted on the same day, under the same act, and sentenced to an hour in the marshal's office and required to register. We offer the records, papers, and files of those two cases, showing that Mr. O'Connell had plenty of time to test the law, starting in on June 27 at least, and no steps have been taken to perfect a writ of error or other proceedings looking to a review of those judgments.

Mr. O'CONNELL. We object to the admission of the evidence because it is in evidence already that Mr. O'Connell has said for them to register; that the registration was a mere census, and it involved no question of constitutional law, and it was only when the conscription came up that that question could be raised. One man was given an hour and the other man 10 days.

The COURT. Of course, if that is your objection it would not be good. If you have any other objection I would like to hear it.

The mere fact that you may have so stated here repeatedly, or you may have stated it to others, does not make it the law. The law is what the court shall finally determine it to be—and I do not mean this

court. The draft law has already been construed, and from a source which has always been regarded, even by the Supreme Court, as a very high authority, and that is the administrative officers whose duty it is to put it into execution. It already has been construed that when a man has been registered, has appeared for his physical examination, and has been found available and subject to service, that thereupon when the board shall have certified him to the authorities as eligible for service, and he has been notified to appear for service, he is then within the military authority.

Mr. O'CONNELL. Now, if your honor please, if he is going to put in the record it should also be put in further—the thing comes back to me now. In one of those cases the defense was that he was 33 years of age—that was the Cohen case; in the other case the defense was that he was already in the military service, and a potential unit; that was the man that the court gave an hour to in the marshal's office. So, really, there was no question in that at all.

The COURT. That is why I asked you if you had any other objection. Of course, unless a case presents a situation where the validity of the law is drawn into question, the fact that a particular judgment may have been entered in it has nothing to do with that question at all.

Mr. PRESTON. The record here shows as plainly as it can be shown that these men had no defense whatever; that Mr. O'Connell interposed two demurrers—a demurrer in each case that I hold in my hand—raising the selfsame constitutional propositions, and talking about a war of aggression, on the 27th day of June.

The COURT. Then I suppose you have no objection to the record going in, as long as you are able to show what was involved.

Mr. O'CONNELL. I think we should have the stenographer called.

The COURT. Oh, no, we don't go by what a stenographer has taken down after a case goes to judgment; we go by the judgment roll.

Mr. PRESTON. If he did make these points, they were all determined against him; the jury found against both defendants.

The COURT. If you have no objection let the records go in; you can both have your opportunity to present anything that grew out of them.

Mr. PRESTON. I want to show these famous demurrers.

The COURT. What was the charge?

Mr. PRESTON. Evading the draft act by failing to register. That has been the issue.

The COURT. That would involve the validity of the act.

Mr. PRESTON. Why, certainly. And it has been decided four or five times on this very issue, that it was constitutional.

Mr. O'CONNELL. But we came to the conclusion that it was not a proper case in which to present the thing.

Mr. PRESTON. Why not? You had your men in jail.

Mr. O'CONNELL. They were not my men. I was brought into the case at the last minute. Those were the sentences; one man served his sentence in an hour. It would have been foolish for a lawyer to put that man to the trouble of testing that law. The

other man was in for 10 days; in 10 days his trouble was over.

The COURT. That is an argument as to the weight of a piece of evidence, not to its admissibility. It is very frequently the case that an instance is sought in testing the validity of an act that has a sweeping effect, and sometimes, in fact, a case practically made which will not, during the pendency of the action, inconvenience anybody seriously for the very purpose of having the act tested.

Mr. O'CONNELL. But this was June 27. The American Patriots was not organized until July 14.

The COURT. I understand that.

Mr. O'CONNELL. There was no determination at that time to test the act, although we were of the same opinion about the act; there was not the ability to test it. It seems to me I ought to object to the admission of that evidence as being immaterial, irrelevant, and incompetent, and no foundation laid.

The COURT. I will sustain the objection if you make it—that it is not material here.

Mr. PRESTON. What is not material here?

The COURT. The record.

Mr. PRESTON. Why not?

The COURT. Because it is not the method of testing whether or not this act is constitutional.

Mr. PRESTON. I think it ought to be here shown for the purpose of testing the good faith of this defendant.

The COURT. You are testing the good faith of Mr. O'Connell, but that is all.

Mr. PRESTON. Isn't that proper? It was in June, and it was since the conspiracy started. Here is one of the defendants coming right along, and has the man in jail, the very time that a writ of habeas corpus could be applied for.

The COURT. But you have the same fact in different form—that there has been no case initiated or started to test the constitutionality of the act at all.

Mr. PRESTON. And I think it also ought to be in the record that the Department of Justice has stipulated and has done everything to get an early decision, and there is a case already in the Supreme Court on it. I think it is perfectly proper to show what this defendant was doing, showing that he had all this same war of aggression and all of this stuff hatched up as early as the 18th or 19th of June.

The COURT. Mr. Preston, I have ruled this out. I thought at first Mr. O'Connell had consented that it go in. He asked you to produce the record and you procured it, and then he objected to it.

Mr. O'CONNELL. I thought the record showed the true facts.

The COURT. It states exactly what Mr. Preston stated.

Mr. PRESTON. I offer this demurrer as an act and declaration on the part of O'Connell—an act to show his motives. It is a statement of the defendant over his own signature.

The COURT. What is the statement?

Mr. PRESTON. It characterizes this as a war of aggression, and that we have sold out, and he is the only man left at the outposts; that everything has gone wrong from Jefferson down.

The COURT. Who passed on that demurrer?

Mr. PRESTON. Judge Dooling.

The COURT. The propriety of that demurrer was for the judge who passed upon it.

Mr. PRESTON. I say that no man who had a proper motive would draw or file any such papers. And we have another demurrer in this case, and I want to

offer that while I am on my feet. I want to read those documents.

Mr. O'CONNELL. We object to the offer at this time. We set up the unconstitutionality in the demurrer.

The COURT. I thought you told me it didn't involve anything of the kind?

Mr. O'CONNELL. It did not, if your honor please. And then Judge Dooling——

The COURT. I made my ruling on the proposition that it did not involve anything of the kind.

Mr. O'CONNELL. We put in our demurrer; the judge overruled the demurrer, saying that the registering was a mere census. Then after that came the trial of the case, and——

The COURT. What was the indictment—for failing to register under the act?

Mr. O'CONNELL. For failing to register.

The COURT. If that is the case, Mr. O'Connell, you could not avoid the issue being raised as to the validity of the act.

Mr. O'CONNELL. We raised it in the demurrer only.

The COURT. It is the only way to raise it in a criminal case, except to ask the judge to charge the jury that an act is unconstitutional.

Mr. O'CONNELL. Well, the case developed as I told your honor; and one man said he was in the service; he produced his discharge from the Army—that is, a discharge before his time expired, which he considered as still keeping him, as he expressed it, a potential unit in the Army. The judge rules against him on that point. He was found guilty and the judge gave him an hour in the marshal's office. He took his hour and he did not want to go any further in the case. The other man was sentenced to 10

days. He said he was 33 years of age. There was some kind of a record where he was arrested elsewhere that put his age less than that. He didn't want to go any further in the case. He immediately served his 10 days. It was all over. We couldn't go any further.

The COURT. The question of law involved in the case has nothing to do with the question of fact. The jury finds the facts only. The record, which includes the pleadings, shows the question that was involved. The question in each case, according to your admission now, did involve the constitutionality of this act.

Mr. O'CONNELL. On demurrer.

Mr. PRESTON. And there was a motion in arrest of judgment, too.

Mr. O'CONNELL. No, you are absolutely mistaken about that. Mr. O'Connell could not go any further if he wanted to. Judge Dooling was so lenient that they both promptly accepted the sentence, and thanked the judge for his leniency, I think.

Mr. PRESTON. That had nothing to do with the case; you could have made a test case out of it.

Mr. O'CONNELL. You could not unless the client wanted to go ahead with the case.

The COURT. I think under your statement, Mr. O'Connell, that these records are admissible. I have stated that it matters not how trivial a sentence or judgment may be; if it involves the adjudication of 1 cent in money under an unconstitutional act, a party is entitled to have that act reviewed. If it involves one hour's incarceration as the punishment for the infraction of a criminal act, that entitles the party to an adjudication. Its weight is for the jury. Here your claim is that your whole effort in this matter

has been to get the constitutionality or validity of this act determined. Isn't that true?

Mr. O'CONNELL. Yes, your honor.

The COURT. That was your sole purpose.

Mr. O'CONNELL. Yes, your honor, in addition to others about amending the Constitution.

The COURT. Well, that, I shall tell the jury, we have nothing to do with at all, because that is not involved in the question as to your right to obstruct the execution of a law. You have a right—any citizen has a right—to question the validity, which includes the constitutionality, of course, of a particular act; you have a right to call that into question in the court, but that is your whole right; you have no right where you fail and you have refused to have it tested in the courts, to advise anybody to refuse to conform to it, or to obstruct it in any way. That, I have observed throughout the trial, you recognize perfectly. Now, then, according to your last exposition of what is involved in these cases, these cases did involve the validity of this act, did they not?

Mr. O'CONNELL. Yes; your honor.

The COURT. There could not have been a verdict which would have subjected a man to punishment for a moment if the law was unconstitutional, could there?

Mr. O'CONNELL. No; your honor.

The COURT. Now, all that they are offered for is to show, as against your present claim, you being one of the defendants here, that your whole purpose has been to test this act; that here are two instances presented where you have failed to take any steps to test them—I mean after the trial.

Mr. O'CONNELL. Now, would your honor say this, that if the client—that if the defendants in those two cases did not want to go through——

The COURT. If you desire to you can show that such was the fact; the record does not show that.

Mr. O'CONNELL. With that, your honor, I am perfectly willing. I withdraw my objection.

The COURT. Very well.

Mr. PRESTON. The indictments in these cases were returned in court and filed on the 19th of June, 1917, and each of them charged that the defendant therein named had failed to register as required by the military draft act, passed May 18, requiring registration on June 5. These cases both proceeded to trial. Mr. O'Connell in the one case interposed this demurrer—and, by the way, this is the fellow that drove the John Bull wagon up and down the street. It reads as follows. (Reads.) The other parts of the record, and the judgment roll proper, may be considered as read.

Now, while I am on my feet, I want to offer the demurrer in the present case; it was stricken from the files by the court.

Mr. O'CONNELL. I object to that, if your honor please, as immaterial, irrelevant, and incompetent.

Mr. PRESTON. I am willing that it be limited to Mr. O'Connell himself, but I think it is admissible against him.

The COURT. Yes. The conspiracy is at least presumed to have ended upon the arrest of a defendant and their apprehension on the charge contained in the indictment. I do not think the rights of the defendants, other than Mr. O'Connell, could be jeopardized by anything occurring subsequently. I do not think I would be disposed, as against objec-

tion, to admit it against him, because it is merely the result of his judgment as to what would be a proper mode of preserving his rights under this indictment.

Mr. PRESTON. I think it reflects materially on the question of the motive of this defendant. A man who brands his own country as treasonable——

Mr. O'CONNELL. No, I don't do anything of the kind.

Mr. PRESTON. Then withdraw your own objection.

Mr. O'CONNELL. I object to that characterization, your honor.

The COURT. Are you willing to have that feature that he refers to of the demurrer go in?

Mr. O'CONNELL. No; I want to keep out as much as I can that will prejudice the case.

The COURT. There were certain portions of this demurrer that were regarded by the court as scandalous and as being impertinent to any question before the court under the indictment; the court ordered it stricken from the files so far as that matter was concerned, preserving the legal objections raised by it for your benefit. The objection is sustained if it is insisted upon.

I hereby certify that I have carefully read and examined the foregoing transcript of a portion of the evidence and proceedings in the case of *United States* vs. *O'Connell*, tried before me, and that from such examination I am fully satisfied that said transcript correctly and fully recites the said proceedings as they occurred at said trial.

WM. C. VAN FLEET,
United States District Judge.

UNITED STATES OF AMERICA
vs.
DANIEL O'CONNELL ET AL., DEFENDANTS.

City and County of San Francisco,
State of California, ss:

Charles R. Gagan, being first duly sworn, deposes and says: That he is and has been ever since the first day of November, 1913, official reporter for the United States District Court in and for the Northern District of California; that as such official reporter he took down and transcribed all the testimony given and proceedings had, including the charge to the jury, in the case of *United States* versus *O'Connell et als*, which was tried in the United States District Court in and for the Northern District of California, beginning the 12th day of September and ending the 25th day of September, 1917; that the attached volume of the "Reporter's Transcript" in the said matter, consisting of 10 pages, contains a true and correct transcript of all the proceedings had in connection with and the statements of court and counsel pertaining to the introduction in evidence in the said case, on September 18, 1917, of the records of the United States District Court for the Northern District of California in the two cases of *United States* vs. *Samuel Cohen*, No. 6122, and *United States* vs. *Vittorio Gambo*, No. 6123, which proceedings are referred to

in the bill of exceptions set forth on page 74 of the printed transcript of record upon writ of error to the Supreme Court of the United States in a memorandum reading:

"The United States attorney here introduced in evidence the minutes in the two cases of *U. S.* vs. *Samuel Cohen* and *U. S.* vs. *Vittorio Gambo*, and after considerable argument between counsel the court admitted the records in evidence, and the United States attorney read the demurrer in the Cohen case to the jury, and in the Gambo case considered it read; the offer of the demurrer in the present case being objected to by the defendant, the offer was rejected by the court."

CHARLES R. GAGAN.

Subscribed and sworn to before me this 13th day of February, 1920.

[SEAL.] J. A. SCHAERTZER,
Deputy Clerk, U. S. District Court,
Northern District of California.

(Indorsed:) *United States of America* v. *Daniel O'Connell et al.* Affidavit of Charles R. Gagan.

(3) A transcript of the complete charge of the court and of everything which took place in reference thereto, certified to by the official reporter and by the trial judge.

The Court.

In the District Court of the United States for the Southern Division of the Northern District of California.

Before Hon. Wm. C. Van Fleet, judge.

UNITED STATES
vs.
DANIEL O'CONNELL ET AL., DEFENDANTS.

No. ——
Vol. ——

Tuesday, September 25, 1917.

REPORTER'S TRANSCRIPT.

Charge to the jury.

The COURT (orally). Gentlemen of the jury, I will ask you to give me your careful attention while I proceed to submit to you the principles of law by which you will be guided in your consideration of the evidence in this case for the purpose of finding a verdict; and I can only ask in that regard the same degree of attention that I have observed on your part throughout the case thus far.

The indictment, which is in two counts, charges the defendants here on trial:

First. With conspiracy to induce and persuade male persons between the ages of 21 and 40 years to refuse to enlist in the military service of the United States, and to induce and persuade persons between the ages of 21 and 31 to refuse to appear when called upon for military service, and thereby obstruct the recruiting and enlistment of troops, in violation of the act of June 16, 1917, known as the espionage act.

Second. With conspiracy to violate section 6 of the so-called selective draft act in that the defendants conspired to induce and persuade persons between the ages of 21 and 31, inclusive, to refuse to present themselves for physical examination under the provisions of said act and the rules and regulations thereunder, and to refuse and fail to appear when called for military service under the said act, rules, and regulations.

And it is charged that in pursuance of such conspiracy, and to effectuate the purpose thereof, the several defendants committed various overt acts specifically alleged; all of which is with due particularity and detail set forth and charged in the two counts of the indictments, which have been read and fully explained to you and need not here be more particularly repeated or recited.

The defendants have interposed pleas of "not guilty" to the charges set forth in the indictment, and these pleas put in issue all the material averments of the indictment and cast the burden of proof upon the Government to establish the truth of those averments to the degree I shall hereafter state to you before a conviction may be had. I should suggest to you at the threshold that as to the defendant Mengedoth, named in the indictment, who was placed on the stand as a witness for the Government, the indictment has been dismissed, and with him, therefore, your verdict is not concerned, nor does the fact of the dismissal as to that defendant in anywise affect the legal rights of the remaining defendants or the question of their guilt or innocence. The selective service law, charged to be violated, provides for both enlistment and draft of men eligible under the terms of the act for service in the

military forces of the United States, under such rules and regulations as the President may prescribe, consistently with its provisions.

Section 3 of the espionage act, so far as pertinent to this charge, provides that whoever "shall willfully obstruct the recruiting or enlistment service of the United States to the injury of the service of the United States shall be punished" as therein provided; and section 4 of the last-named act provides that "if two or more persons conspire to violate the provisions of section 2 or 3 of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy."

The law, as you will thus perceive, makes it an offense to willfully obstruct the recruiting or enlistment service of the Government, and it is likewise made an offense to enter into a conspiracy to accomplish such purpose.

There is nothing difficult to understand in the term "conspiracy" as used in the statute and in the indictment. So far as this charge is concerned, a conspiracy is an agreement or understanding between two or more persons to do or accomplish an unlawful act. Wherever two or more persons act together understandingly for such an unlawful purpose there is a conspiracy, although there may not have been a word spoken between them regarding it. Every scheme to commit an offense against the United States in which two or more persons cooperate understandingly to carry it out is a conspiracy in fact and effect, and this is true even though the parties to the scheme or understanding may not at the time

be aware that their acts will render them in law guilty of a conspiracy. If they are knowingly working together to a common purpose and that purpose is the illegal act charged as their object, they are as guilty as though they were perfectly aware that their acts amounted in law to an unlawful conspiracy. Ignorance of the law is no defense to an unlawful act willfully done, and it is therefore immaterial that the party committing such an act may not in fact be cognizant of its legal consequences. In the present case, therefore, if you find that these defendants were intentionally working together to a common purpose in doing the several acts charged and that those acts were of a character which did or would result in obstructing the recruiting or enlistment service of the United States, either by inducing persons liable to service thereunder not to conform to or submit to the requirements of the law, or to refuse to be enlisted or recruited in the military service of the United States, then they would be guilty of conspiring to commit the offenses charged in the indictment. And this would be true although the term "conspiracy" may never have been employed between them, and although no suggestion may ever have been made by anyone of them that their purpose was to obstruct or interfere with the execution of the statute in question.

The law, as we have seen, provides that if two or more persons combine to commit an offense, and one of them does some act in furtherance of the object, all of the parties thereto are equally guilty. The essence of the crime, therefore, is the unlawful agreement or understanding between the parties to do an act of a criminal nature; and, as we have seen, it is a crime against the United States to commit

the acts charged as being the object of this alleged conspiracy.

The formation or existence of a conspiracy may be shown either by direct or positive evidence, such as declarations or writings, or by circumstantial evidence, such as showing that the parties charged acted in concert or in a manner or under circumstances warranting the inference that their acts were the result of previous understanding or agreement between them. In other words, the existence of a conspiracy may be manifested either in words or in deeds. In this case, therefore, as I have indicated, even though you may not find that there was any open or express declaration of purpose on the part of these defendants to unite in doing the acts charged, yet if you find that those acts were committed or accomplished in a manner or under circumstances which, by reason of the relations of the defendants at the time and the methods used by them, give rise to a reasonable and just inference that they were done as the result of a previous arrangement or understanding between them, then you will be justified in finding that a conspiracy existed between them to do such acts. Nor is it necessary in the formation of a conspiracy that all of the parties thereto shall actually meet together at one and the same time or place and discuss its purpose or the means of carrying its object into effect, or in any formal way agree upon the methods to be pursued in accomplishing such design. A conspiracy may be and frequently is formed and carried out without the express declaration of its purpose by any of those concerned, which in itself would necessarily tend to disclose the existence of a concerted purpose; and yet when considered in connection with

the acts of the parties, or when the acts themselves are considered independently of any such utterance, the existence of the conspiracy may be made clearly to appear; and when made to appear in that manner it satisfies the law. It is sufficient if the circumstances shown satisfy you to the degree I shall instruct you that the parties thereto were acting together toward a common end, and that that end was the unlawful act or thing charged as the object of the alleged conspiracy.

Where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, purposely work together in any way in furtherance of the unlawful scheme, every one of such persons becomes a principal in the conspiracy, although the part some of them may take therein is a minor or subordinate one or is to be executed separately or at a distance from the other participants. It is not essential to the guilt of the defendants that the conspiracy charged prove eventually successful, so long as it appears that some overt act charged in the indictment was done by some one of the parties to the conspiracy for the purpose of carrying the same into effect. As I have stated, where several persons are shown to have combined together for the same illegal purpose, the law is that an act done by one of the parties in pursuance of the preconcerted plan and to effect the purpose of the combination, becomes the act of each party thereto and evidence of such act is admitted as evidence against all. While the declaration of a coconspirator can not alone prove the existence of the conspiracy itself, yet any declaration or statement made by one of the parties during the existence and in furtherance of the unlawful combination, when it is established,

is not only evidence against the one making such declaration, but is evidence against the other parties thereto, who are as responsible for such declarations or statements as if made by themselves. But you will understand that before any such statements or declarations can be considered as evidence against the defendants other than the one making them, the circumstances must be such as to satisfy you that a conspiracy had been formed and then existed to do the act charged and that the defendant against whom such declarations are sought to be used was a party thereto.

You will apply the principles that I have thus far stated to the evidence in determining whether or not a conspiracy existed between the defendants to commit the act charged, and, as you will appreciate from what I have said, that is the first essential inquiry for your consideration; since, if the conspiracy has not been shown, the defendants should be acquitted. This is so because the offense charged is conspiracy, and unless that offense be established the defendants can not be convicted, regardless of what they may have done individually.

If you find that there was such conspiracy, then you will determine whether the defendants on trial were parties to it. This you will ascertain from all the facts and circumstances in the case under the principles I have stated.

If you find that the conspiracy existed and that the defendants were parties to it, then you will determine whether the overt acts charged or some one or more of them were committed by one or more of the parties to the conspiracy to effect its object.

An overt act is an open, manifest act, such as those alleged in the indictment, done by some one or more of the parties to the conspiracy to effect its object.

It is not necessary, as I have indicated, that the Government prove each and all of the overt acts charged in the indictment. It is sufficient if the jury are satisfied that a conspiracy existed for the purpose charged, and that some one or more of the participators did some act as charged in furtherance of and to effect or carry out its object.

The defense advanced by the defendants under their pleas of not guilty is in substance that there was no conspiracy entered into by them to obstruct or interfere in any unlawful way with the execution of the acts in question, as charged; that being honestly of opinion that the selective service law was unconstitutional and void, they determined to test its validity in the courts, and to that end they united and organized the corporation mentioned in the evidence called the American Patriots, as the most convenient means or agency for the purpose, the claim being that the testing of the validity of the act by any one individual would prove too onerous and expensive to be singly undertaken; that all the acts, declarations, and other things charged against them so far as committed were done and committed by them as members of this corporation for the lawful purpose stated and for no other; that all such acts were entirely legitimate, and that any and all expressions of opinion and declarations made by them against the validity of the law were within their rights under the provision of the Federal Constitution guaranteeing the right of free speech.

If you find under the principles I shall state to you that this defense is sustained by the evidence, or if after a careful consideration of the evidence under those principles there remains in your minds a reasonable doubt, as I shall define that term to you, of the

truth of the defense or the guilt of the defendants, then the Government will have failed to establish the charge to your satisfaction, and the defendants must be acquitted.

There are some considerations involved in this defense, however, and some features of the evidence in the case which it is proper for the court to call to your attention. The defendants, in common with all other citizens, have a perfect right, in good faith and for an honest purpose, to question the validity or constitutionality of a law affecting their property or their life, liberty, or happiness; and they may do this either individually or through the instrumentality of a corporation honestly formed to secure financial aid for the purpose. But in whatever form the attack is made they must take care that the steps taken and means adopted to that end are legal and proper means, and not such as to transgress the laws of the country. The fact that they may act through a corporation does not justify them in any course of action which the law would not sanction in individuals. In other words, an act which if done by an individual would be illegal, would be quite as illegal if done under the guise or form of a corporation. A corporation is a mere artificial person, made up of an aggregation of natural persons, and for all its acts, which must, of course, be performed through the agency of its members, those members are quite as responsible as if acting individually. No one is at liberty, no matter upon what claim or pretense of right, to knowingly obstruct or resist the execution of the laws of the country or induce others to do so. To apply these principles to the present charge, no matter how honestly and firmly the defendants may have believed that the selective service law was unconstitutional,

and no matter how earnestly they may have desired to have the question determined in the courts, they would not be justified, either to enable them to secure financial aid or for any other purpose, to obstruct and prevent its execution by inducing others through improper means to resist or refuse to conform to its requirements. Neither the right of the citizen to resort to the courts for a redress of his grievance, nor his right of free speech, as guaranteed by the Constitution, confers any right in the exercise of either of those great privileges to use them as a medium through which to wantonly resist or obstruct the execution of the laws. Free speech, as I had occasion to indicate to you earlier in the trial, does not extend to the privilege of doing or saying that, either in speeches or writings or other medium of expression, which is calculated and intended to excite in the public mind opposition to a law or measure to an extent that will prevent or obstruct its execution by those whose duty it is to carry it into effect. That is not free speech. An attorney or lawyer is in no different category in this respect from any other citizen. He may from the point of honest belief in the correctness of his own views advise and instruct his client as to his rights or what he honestly conceives them to be, and he may take all proper steps and measures to protect those rights either in court or elsewhere; but it does not fall within this privilege to do anything, not essential to his client's protection, calculated to induce others to resist or obstruct the enforcement of any such measure. Such a course is without the limits of anything necessary or proper in the protection of his client's cause, and equally outside the proper limits of any right or privilege attaching to his office of attorney and counselor at law. An

attorney is as much subject to the proper limitations of the right of free speech as any other citizen.

Now, the theory upon which the Government's case proceeds is, in substance, that the defendants have transgressed the principles I have stated and have violated the law by deliberately and intentionally entering into an unlawful combination or association to thwart, interfere with, and obstruct the carrying out and enforcement of the selective draft act by a course of conduct consisting of a series of acts not only intended but calculated to accomplish this unlawful purpose; that the organization of the corporation called the American Patriots was not had in good faith with any genuine purpose of testing this law, but was intended to be used merely as a means through which to secure funds for the use and benefit of those organizing it, and with which to conduct a propaganda against the act, with the intent to hamper and defeat its execution and to use the corporation as a mask or cloak for their operations, under the mistaken idea that thereby the individual members would be shielded from responsibility for their acts; that in pursuance of this purpose the defendants and others inspired by them, issued and distributed pamphlets, circulars, advertisements on wagons, legal opinions and other literature, made public speeches and film presentations, and gave private advice to individuals, all of which was of a character to render it unlawful, and was designed and intended to inflame the minds of the people, and particularly those subject to and eligible for military service, against the propriety and validity of this act, and to arouse active opposition thereto, and thereby persuade and induce them to refrain from enlisting in the military service or complying with the compul-

sory requirements of the act, and thereby to obstruct and interfere with its execution and enforcement. If you find this theory of the Government to be sustained by the evidence, then it will be your unquestioned duty to find the defendants guilty.

As I had occasion to state in your presence in passing upon the motion of the defendants for an instructed verdict, there is evidence before you which is sufficient in its legal tendency—that is, sufficient as matter of law—to sustain the Government's theory; but whether it is such as to satisfy you of its truth is a question wholly for your consideration and determination, as I shall more particularly instruct you.

I do not deem it necessary to review the evidence in the case at length, as is my right; you have heard it all and, as I have observed with satisfaction, with a close and attentive ear. I may, therefore, leave it for your intelligent consideration, feeling full confidence that you will not overlook any of its material features and in your ability and disposition to reach only just conclusions therefrom. I should, however, notice the legal aspects of some of the facts which the evidence tends to establish, the tendencies of which might not otherwise be readily apprehended by the minds of laymen like yourselves—that is, men not versed in the law.

Among other documents which the evidence tends to show were put out and furnished by the defendants through the American Patriots and those in its employ to people who came to its office was a so-called legal opinion admitted to have been prepared by the defendant O'Connell, a copy of which has been put in evidence. It is in the form of questions and answers for the guidance of men seeking advice

on the subject of the draft, and in its contents these questions and answers are found:

"2d. Will they report to exemption or examining boards? Answer. As the boards might have them take the oath or sign some papers putting them in the military service, the safest way is to not go, but simply file an affidavit of exemption, as the best and safest way of testing the law.

"3d. If they refuse to go are they under military law? Answer. No; they are not.

"4th. Can the military authorities proceed against them? Answer. No.

"Also: If the law is declared constitutional, then the worst that can happen is that the defendants will have to serve a year in jail."

These answers do not state the law. In the rules and regulations promulgated by the President in accordance with the terms of the selective service law is this:

"Each district board shall certify in quadruplicate on forms provided by the provost marshal general for that purpose, to the adjutant general of the State, Territory, or District of Columbia, as the case may be, the serial numbers, names, and detailed addresses of all persons called by local boards within the jurisdiction of such district board who have not been exempted or discharged; separate certificates shall be made in respect of the men called by each of the several local boards. Upon receipt of such addresses shown in the certificates notify each man whose name has been so certified that he has been selected for military service and shall order him to report for military service in person at a specified time and place, to be fixed pursuant to advices from The Adjutant General of the Army. From the time so

specified each man to whom such notice shall have been so mailed shall be in the military service of the United States."

This rule the President was duly empowered to make and is a perfectly valid regulation. In accordance with its terms, where a drafted man has been notified, as there provided, that he has been selected for service and is ordered to report for duty, he is from that moment in the military service and subject to military law, and for a refusal to obey the order may be proceeded against by the military authorities and forcibly arrested if need be. Nor is it the law that if the act be held constitutional the worst that can happen to the person arrested for failing to report is a punishment of one year in jail. He may not only be thus punished, but may then be required to give his service in the Army. And it is not the law, as contended at the trial by defendants, that if a man reports for service in obedience to the notice to appear he then loses any right to resort to the civil courts to test the validity of his compulsory service. As I had occasion to say earlier in the trial, if he deems the law under which he is taken to be invalid or unconstitutional he still has his remedy by habeas corpus to test its validity. The civil courts may in any case inquire into the validity of the process or warrant under which a citizen is detained against his will, whether in the Army or elsewhere. The advice given in this opinion was therefore erroneous and misleading as not stating the law. It does not follow, of course, that one may be held guilty of an offense for giving mistaken advice as to the law. If it is given in good faith as representing the honest though mistaken views of the party giving it, it is not in itself criminal; but you have a right in connection

with all other circumstances to consider its erroneous character in determining whether it was given in good faith and for an honest purpose, as is the claim made here, or was intended as part of a scheme to obstruct the enforcement of this law.

There is also evidence tending to show that there was prepared by the defendant O'Connell a form of exemption claim to be presented and filed with the local boards by those who were notified to report for examination, and that large numbers of these forms were furnished to those who joined the American Patriots for their use before those boards, with the direction to present them to be filed, and that a considerable number were tendered by young men who objected to service; that among other things stated in this form was this language:

"I am certain that notwithstanding all the humbug and lies published in the newspapers and other publications of the world, there is not, and can not be, the slightest danger to the United States; as this war is simply a war of aggression, conquest, and greed on the part of England, and England and her agents have secured a vote of Congress assisting them in this war, which vote was in violation of the Constitution and will be reconsidered by the next Congress, who will have full power and express directions from the people."

You are advised that the matter thus stated was wholly unnecessary to the statement of any legal objection the so-called exemption claim may have otherwise set up; that it would subserve no good or useful purpose in support of any such objection, but was well calculated to create antagonism, in the minds of those to whom it was furnished, to the law in question and induce them to oppose and refrain from

conforming to its requirements, and thereby bring about obstruction to its enforcement. You have a right, therefore, to consider it in the light of all the other facts and circumstances in the case in determining whether the purpose of the defendants in putting it forth was the legitimate and innocent one they claim, or was in fact intended to subserve the purpose claimed by the Government of provoking and inducing obstruction to the enforcement of this selective-service law.

The evidence also tends to show that the defendants and other members of the American Patriots and persons in their employ put forth and disseminated large numbers of what are denominated in the evidence as "membership circulars"—circulars soliciting membership in their organization. These circulars, among other things, contain this language:

"The American Revolution was fought, won, and the Republic established by 'Sons of Liberty,' an organized minority, in spite of the opposition of Tories, grafters, and grovelers before wealth and office, in those days, assisted as they were by the purchased press, suppressing the truth and publishing lies, for the purpose of scaring or humbugging the people. At present all that these American heroes fought for and won is in extreme danger of being lost. To save the Republic we have therefore organized the American Patriots."

This language, when read in connection with the other statements, has a distinct tendency to engender opposition and resentment against the act in question and to induce refusal to comply with its requirements, and you have a right to consider it with all the other circumstances in determining whether the purpose of those sending it forth, if you find it was so sent, was

the innocent one they claim or the sinister one claimed for it by the Government.

There is also evidence tending to show that on July 3 the defendant Herman B. Smith made an address or speech at a public meeting in Dreamland Rink in this city, in which he used this language in speaking of this act:

"On September 1 we are going to have a big lottery in this country to see which ones of us go over there first to be slaughtered. There are a lot of boys who do not want to go; they would undoubtedly be willing to die in America or to go and take part in the wars of this country. Now, these boys, friends, are going to demand that we stand by them. Every one of us here who are above the age must do his share in aiding those boys to stand firm in their conscience and say they will not go. * * * There is an organization throughout the whole Nation to see that their fight is taken care of. We want you to help. We have started one in San Francisco here, and there are others being started, and we want you to give us your assistance. The Government has asked you to buy Liberty bonds, finance the war, and give our boys to be maimed and killed. We want to save our boys at home, to save them from going to that hell in Europe. Let us stay here and help them. Any money that you pay to-night, after defraying the expenses of this meeting, will go to save our boys."

This language, if not distinctly seditious in character, was at least outside and beyond any such purpose as claimed by the defendants as the objects they had in view, and its natural and only tendency would be to inflame the mind of the public and sway it against the act in question and induce them to oppose

and obstruct its enforcement. It was therefore wholly unjustified for any innocent purpose and was not protected by the right of free speech or otherwise, and you have the right to so consider it in determining the defendants' purpose.

In that connection there is also evidence tending to show that the defendant O'Connell, at a public speech at Lodi on August 6, in contending that the act in question was unconstitutional and that it could not be legally enforced, among other things advised those present not to take the oath or sign any papers whatsoever that would put them in the service, and declared that the men who left the United States for Europe would not return; that the average life of a soldier in the trenches was 48 hours; and said in substance, "I wonder if it is 48 hours, with those machine guns on both sides throwing bullets so fast that when a man throws up his head he is gone and when they stick up their bodies to run across 'no man's land'—you wonder how they last 48 hours"; that he stated a large number of test cases would be started; that each case would be a separate case, and if a man should be ordered into the service before he could get his case tested the worst that could happen to him would be that he would stay in jail until it was decided, or be out on bail; but that the new Congress would be elected and would repeal the draft law; that the war was not a war of defense; and that the Constitution was being violated because it did not allow them to take soldiers out of the country. If you find this evidence to be true, the advice thus given, and the declarations made were not within the right of Mr. O'Connell in any honest purpose he may have had to test this law, nor to secure aid with which to make

such test, nor by any right of free speech in connection with such object, and you have a right to so consider it in determining the real purpose for which the language was uttered.

These things to which I have called your attention you have a right to consider with all the other evidence in the case in determining the purpose for which they were done; and if you find that they tended to obstruct this law and were committed by the defendants in the course of a combination or conspiracy between them to accomplish the purpose charged, then the defendants or any of them who were parties to such conspiracy would be guilty and you should so find.

In reaching your verdict, however, you must consider all the evidence in the case, that for the defendants and that for the Government; it is to be all taken into account and your verdict based upon it as a whole. I should add, however, to what I have said as to determining the purpose or object of the defendants in any acts they did, what I said with reference to conspiracy—that is, if you should find that the effect of those acts, under the principles I have stated, was to obstruct the recruiting or enlistment service of the United States—then if you find that those acts were deliberately and intentionally done by the defendants, it would make no difference under the law that defendants did not actually know that those acts would result in a legal sense in obstructing the execution of the law. Men are presumed to intend the ordinary consequences of their voluntary acts, and, as I have before said, ignorance of the law is no excuse for crime.

Now, as I have said, the burden of proof in this case is upon the Government. The law, in its

charity, presumes the innocence of a defendant, and that presumption abides with him throughout the trial and until his guilt is established by the evidence. This is a humane provision of the law which is intended for the protection of the innocent and to guard, so far as human agencies can, against the conviction of those unjustly accused of crime. Before a conviction may be had it is incumbent upon the Government to prove each fact essential to the guilt of a defendant by evidence which satisfies the minds of the jury beyond what is termed in the law a reasonable doubt, and that means by evidence which satisfies their minds to a moral certainty, and which accords with their reason and judgment to an extent which would induce them to act in the important affairs of life. If, therefore, after a full consideration of the evidence presented, the jury are conscientiously able to say that they entertain such a doubt as to the guilt of the defendants on trial, or any one or more of them, they must resolve that doubt in favor of any such defendant by an acquittal; and if you entertain such doubt as to all the defendants, then you should acquit them all.

But you will not understand from this that the Government is called upon to make a case free from any possible doubt—that is, to prove the guilt of the defendants on trial to an unassailable demonstration. Such is not the law, for such proof is rarely obtainable in dealing with human transactions; in other words, the doubt which will justify your hesitation must be based in reason and arise upon the evidence, and not consist of a mere hesitation growing out of your sympathies, or based upon something other than a fair and impartial consideration of the evidence in the case.

You will understand, gentlemen, from what I have said, that you may convict or acquit any one or more or all of the defendants as the facts may warrant. It is not incumbent on the Government, notwithstanding the offense is so charged, to necessarily show that all the parties alleged to have been concerned in that conspiracy were in fact participants in it in order to convict any of them. Because all the defendants on trial are included in one indictment and tried together it is not required that you convict all in order to convict any; of that if you acquit one you must acquit all. If you find that there was a conspiracy as charged, and that any one of the defendants on trial was a party to it, you may convict him, although acquitting the others.

Now, gentlemen, I have stated to you all that I desire to so far as the specific principles applicable to this case are concerned. The evidence is all before you; the issues are not complex, and in my charge I have tried to simplify them as much as possible for your guidance. As I have said, you are the triers of the facts, and to you the evidence has been addressed, the court simply regulating its admission.

If during the trial in any ruling made by the court, or in any expression of its views on a question arising, or by questions asked of a witness, you have gathered any impression that the court was expressing its judgment either as to the guilt of a defendant, the credibility of a witness, or as to any other matter which the law rests in your hands, you are to entirely ignore any such impression and base your verdict solely and alone upon your own independent judgment as to what the facts are in the case.

The case is now ready for your consideration, but there are one or two suggestions I wish to make as to your duty in that regard. You should one and all go to your jury room with open minds, ready and willing to discuss the case freely and fully with your fellows in order to reach a conclusion; and above all things be certain before you bring in your verdict that it is based solely and alone upon the evidence in the case and to no extent upon any extraneous consideration. To permit any bias, on the one hand, or prejudice, on the other, flowing from outside considerations or your sympathies, to find reflection in your verdict would be a violation of your oaths and result only in a miscarriage of justice. To give heed to such considerations and disregard the evidence would be at once at variance with your duty and a reflection upon the jury system. The defendants and the Government alike and equally are entitled to a fair and impartial trial upon the evidence; nothing more and nothing less. If, therefore, the evidence in this case establishes the guilt of these defendants or any of them beyond a reasonable doubt such as I have defined to you, it will be your duty to so find unhesitatingly and entirely regardless of what your sympathies may dictate. If, on the other hand, a reasonable doubt is left upon your minds as to their guilt or that of any one or more of them, then the benefit of that doubt can be accorded only by an acquittal.

Now, gentlemen of the jury, I will add this to what I have already said: You must guard yourselves against having your minds withdrawn from the real pivotal question in this case, and that is the guilt or the innocence of these defendants, under the evidence that has been produced before you, upon the charge made in the indictment. These defendants

are not being prosecuted for the entertaining of any particular views or opinions that they may have; they are being prosecuted solely for acts which the Government has charged had a necessary tendency to obstruct the law under consideration here. It makes no difference how honest their views may have been; as I have said to you, if they have done acts which under the law would result in obstructing the execution of this statute, and there was a combination between them for the purpose, then they are guilty. If they have not done those acts, or if you have a reasonable doubt of the fact that they have done those acts, then they must be acquitted. Your duty is plain; you are not to permit any consideration of extraneous circumstances to in anywise influence your consideration of the evidence in this case. We are all aware—we can not escape the knowledge—that the situation in which the country finds itself at this time is an exceedingly grave one. That fact however, gentlemen, should make you more careful rather than otherwise to see that your verdict to no extent reflects any prejudice or bias growing out of that situation. If the laws of the country have been transgressed by these defendants, then it will be your duty to find a verdict which will subject them to punishment; but the fact that the laws may have been or are being broken by others, if such knowledge has come to your attention, is something that you must entirely ignore; such knowledge must not be permitted to bear to any extent against these defendants. They are entitled to be judged solely upon the evidence produced here.

Are there any suggestions or exceptions by counsel?

Mr. PRESTON. I want to make a suggestion on behalf of the Government. I did not hear the court

say anything on the question as to whether or not an overt act in itself had to be criminal; nor on the question as to what the status of a man is who joins a conspiracy after it was theretofore formed.

The COURT. An overt act need not in itself be criminal; it may be an entirely innocent act, that is, so far as considered separate and alone is concerned, and yet taken or had in pursuance of an unlawful conspiracy calculated and intended to carry out that conspiracy, the innocence of the act itself in nowise avoids the result which would flow from its being done; it would be under the law an illegal act for that purpose.

Now, so far as the other question is concerned—that is, so far as the formation and the existence of a conspiracy is concerned, gentlemen, it is not essential that all those who may have been shown to be parties to the conspiracy became such at its inception; two or more may form a conspiracy between themselves to accomplish a certain unlawful purpose; if another comes into that combination during its existence and is cognizant that the unlawful combination is on foot, and joins it with that knowledge, then from that moment he becomes a party to the conspiracy and is responsible for every act done by any other member of the conspiracy whether he knows of it personally or not; just as the other members would from that time become equally responsible for any act of his done in furtherance of the unlawful object.

Mr. O'CONNELL. I noticed some things as you went along, if your honor please, but I was not fast enough to take them down; I thought I might get them from the stenographer afterwards. There was one thing I think you ought to charge the jury more on, and that was whether Mr. O'Connell was correct or not in

his legal conclusions should not in any way prejudice the case of the defendants.

The COURT. I told the jury distinctly that a man is not to be held guilty of crime simply for giving incorrect legal advice if it is honestly given as representing his views and intended for the legitimate purpose of advising his client; but the fact that advice under such circumstances was incorrect may be considered by them simply in passing upon the question as to whether it was given in good faith in connection with all the other facts in the case.

Mr. O'CONNELL. Your honor said something about a considerable number of these claims of exemption having been presented. According to the evidence here I think there is only about half a dozen of them, I think two or three, here.

The COURT. Well, three would be a considerable number of an illegal document.

Mr. O'CONNELL. There were some other points—I don't want to delay the jury if I can point them out to you afterwards.

The COURT. No. Under our system, Mr. O'Connell, anything you wish suggested to the jury must be stated now.

Mr. O'CONNELL. Well, about what was said at Lodi, will the jury have the full speech with them?

The COURT. The jury are entitled, if they desire, to have any exhibits in the case; they are not taken out with them in the first instance, because the presumption is, of course, that they remember them; but should they desire to see them they can always have them.

Mr. O'CONNELL. I want to call your honor's attention to that part in regard to conspiracy, that the existence of the conspiracy may be shown by

circumstantial evidence. I want to object to that portion of it.

The COURT. In 99 cases out of 100, perhaps, that is the only way it ever is shown or can be shown. The reason for it is this: Men engaged in an unlawful enterprise do not as a rule openly declare their purposes, or the fact that they are working in combination; and so it must be determined by circumstances. As I said to the jury, when so determined, and they are satisfied that the combination existed, it does not make any difference whether there was ever any declaration about it.

Mr. O'CONNELL. But where the acts are open then the existence of the conspiracy can not be established by inference, but must be established directly.

The COURT. Actions that are susceptible of proof must be open in that sense; they may be secret in a way, but they must be susceptible of proof, otherwise they exist merely in the mind and never become overt acts.

Mr. O'CONNELL. In regard to the speech of Herman B. Smith, I want to ask your honor to tell the jury that should not be taken against any of the other defendants unless at that time there was a conspiracy in existence.

The COURT. I covered that fully. No act, although it might be admissible as to the particular defendant doing it, can be taken against any other defendant who at the time was not in combination with the one making the declaration; it is only by reason of their being in the conspiracy that it becomes binding on the others at all.

Mr. O'CONNELL. Now, one thing more. There was one thing, that if you find the effect it makes no difference that they didn't know; it was something

like that, your honor. I wish your honor would qualify that by saying that it must be the necessary effect.

The COURT. Oh, yes, of course. The law is this: A man is presumed to intend the ordinary consequences of his voluntary act. That results in this: It does not make any difference whether one may know the exact legal consequences of an act he does; if he deliberately does the act, he must know at his peril whether it would result in criminal consequences or not, because of the further principle that ignorance of the law does not excuse. You can readily understand that if ignorance of the law did excuse it could always be urged as a defense, no matter how heinous the charge might be. As a matter of expediency it has been found necessary to adopt, as a part of our jurisprudence, the principle that ignorance of the law will not excuse for a criminal act. And it does not make any difference, Mr. O'Connell, so long as one deliberately does an act—it does not make any difference, I say, whether he knows its legal consequences or not.

Mr. O'CONNELL. But if the result of the act is an incident and not a necessary consequence, then he is not responsible for the incidental act; it must be the necessary and natural consequence of what he does.

The COURT. Yes, the usual and ordinary consequences; what they term the natural consequence.

Mr. O'CONNELL. I wanted to save an exception to the reference to the speech at Lodi, simply as an interference with free speech; and to the ruling that it was not necessary to show that all the defendants were part of the conspiracy.

The COURT. Very well. You may retire, gentlemen of the jury. I should perhaps suggest to you that, as usual, you will find that the clerk has prepared forms of verdict. If you find the defendants not guilty you will simply write in the words, "We find the defendants not guilty." If you find the defendants guilty, then you will simply say, "We find the defendants guilty." You need not write in their names at all because that will imply that you find them all guilty. If you find certain of the defendants guilty and others not guilty then you would have to say: "We find the defendants John Doe, Richard Roe, and Peter Brown guilty; we find the defendant Henry Smith or John Smith, or whatever the name might be, not guilty." And, of course, under the law, where there are a number of defendants on trial, like at present, if, after full consideration, the jury find that they can bring in a verdict as to some of the defendants, but do not agree as to others, you have a right to bring in a verdict as to those you agree upon and to state your inability to agree as to the others, and the court may in that event either discharge you and leave the defendants as to whom you could not agree to stand trial again, or it might send you back for further consideration of the case as to those particular defendants. But your verdict, so far as you agree upon it, would stand as to those as to whom you do agree. I think, unless some one of you gentlemen desires to ask some question, that is all I have to say.

(Thereupon, at 5.27 p. m., the jury retired to deliberate upon its verdict, and, subsequently, at 6.35 p. m., returned into court and rendered a verdict finding all the defendants guilty.)

I hereby certify that I have carefully read and examined the foregoing transcript of the charge of the court in *United States* vs. *O'Connell et al.*, tried before me, and am satisfied, after such examination, that such transcription is in all respects correct and true.

WM. C. VAN FLEET,
United States District Judge.

UNITED STATES OF AMERICA

v.

DANIEL O'CONNELL ET AL., DEFENDANTS.

CITY AND COUNTY OF SAN FRANCISCO, *State of California.* } *ss.*

Charles R. Gagan, being first duly sworn, deposes and says that he is and has been ever since the 1st day of November, 1913, official reporter for the United States District Court in and for the Northern District of California; that as such official reporter he took down and transcribed all the testimony given and proceedings had, including the charge to the jury, in the case of *United States* versus *O'Connell et al.*, which was tried in the United States District Court in and for the Northern District of California, beginning the 12th day of September and ending the 25th day of September, 1917; that the volume entitled "Reporter's Transcript" of the charge to the jury, consisting of pages numbered 625 to 651½, inclusive, which is attached hereto, is a true and correct copy of the charge delivered by Honorable William C. Van Fleet to the jury in the said action on the 25th day of September, 1917, and of all of

the objections and exceptions of counsel taken to the said charge or any part thereof.

CHARLES R. GAGAN.

Subscribed and sworn to before me this 13th day of February, 1920.

[SEAL.] J. A. SCHAERTZER,
Deputy Clerk, U. S. District Court,
Northern District of California.

(Indorsed:) United States of America v. Daniel O'Connell et al., affidavit of Charles R. Gagan.

ALEX. C. KING,
Solicitor General of the United States.

DISTRICT OF COLUMBIA, }
City of Washington, } *ss:*

Before me, a notary public in and for the District of Columbia, came this day Alex. C. King, Solicitor General of the United States, and being duly sworn made oath and said that the statements in the foregoing motion are true to the best of his knowledge and belief.

ALEX. C. KING.

Sworn to before me and subscribed in my presence 25th day of February, A. D. 1920.

[SEAL.] W. MARVIN SMITH,
Notary Public in and for the
District of Columbia.

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INDEX.

	Pages.
HE STATE OF THE RECORD	1, 2
THE BILL OF EXCEPTIONS	2–9
The bill is not part of the record	2–8
(*a*) Data as to filing and allowance	2–4
(*b*) Authorities in Federal courts	4–8
(*c*) No waiver by United States, *de facto* or *de jure*	8, 9
THE RECORD PROPER	9–15
Errors originally assigned on such record foreclosed by prior decisions of this court	9, 10
Errors assigned in amended assignments on such record	10–15
1. The verdict	10–13
2. Construction of Section 6 of selective draft act; whether it covers persons other than draft officers	13–15
THE RECORD WITH THE BILL OF EXCEPTIONS	15–55
Was there sufficient evidence to sustain the verdict under the rules laid down by this court as to the function of the jury?	15–46
"The American Patriots" and defendants' connection therewith	15, 16
The legal limits of such an association	16–20
General attitude of defendants toward the war	20–22
Circulars soliciting members	22–24
Propaganda and advertisements	24–26
Speeches	26
Legal opinion	26–29
Exemptions from draft	29–35
The Lodi meeting, its purpose and effect	35–39
General activities of "The American Patriots"	39–42
Evidence as to particular defendants, particularly David J. and Herman B. Smith	42–46

160722—20——1

THE RECORD WITH THE BILL OF EXCEPTIONS—Contd. Pages.
Admission and rejection of evidence 46–55
Evidence as to actions of David J. and Herman B. Smith prior to formation of conspiracy 46–50
Evidence (rejected) as to authorities brought to the attention of defendants 50–52
Evidence (rejected) as to statements of defendant O'Connell 52, 53
Miscellaneous exceptions as to evidence 54, 55
MOTION FOR DIMINUTION OF RECORD AND AMENDED ASSIGNMENTS OF ERROR 55–75
(*a*) Facts as to said matter and question thereon stated 55, 56
(*b*) Bill of exceptions final, and can not be contradicted 56–58
(*c*) If matter outside said bill to be considered, it it should be as a whole 58
Admission of evidence as to Cohen and Gambo cases 58, 59
Interruption of cross-examination 59
The charge to the jury 60–75
I. Burden of proof 60–63
II. Charge as to legal sufficiency of evidence 63–64
III. Charge as to certain parts of the evidence and as to its effect 64–68
IV. Charge as to the effect of honest belief on the part of defendants 68, 69
V. Charge as to presumption that defendants intended the natural consequences of their acts 69–75
CONCLUSION 75

AUTHORITIES CITED.

	Pages.
Abrams v. *United States*, 250 U. S. 616	74
Agnew v. *United States*, 165 U. S. 36	74
Aiken v. *Wisconsin*, 195 U. S. 194	74
Allen v. *United States*, 164 U. S. 492	74
Allis v. *United States*, 155 U. S. 117	49, 67
Ball v. *United States*, 174 Fed. 32	50
Bellew v. *United States*, 160 U. S. 187	12
Bird v. *United States*, 180 U. S. 356	49, 67
Boyd v. *United States*, 142 U. S. 450	74
Camden Iron Works Co. v. *Sater*, 223 Fed. 611	7
Claassen v. *United States*, 142 U. S. 140	57
Clune v. *United States*, 159 U. S. 590	49, 57
Coffin v. *United States*, 162 U. S. 664	67
Deacon v. *United States*, 254 Fed. 259	49
Debs v. *United States*, 249 U. S. 211	17, 18, 21, 43, 47, 74
Doe v. *United States*, 253 Fed. 903	74
Drumm Co. v. *Edmison*, 208 U. S. 534	57
Equi v. *United States*, 261 Fed. 53	49
Farmer v. *United States*, 223 Fed. 903	49
Frainer v. *United States*, 255 Fed. 28	14, 68, 74
Frohwerk v. *United States*, 249 U. S. 204	10, 74
Goldman case, 245 U. S. 474	14
Goldsby v. *United States*, 160 U. S. 70	50
Goldstein v. *United States*, 258 Fed. 908	24
Hallowell v. *United States*, 253 Fed. 865	50
Harlan v. *McGourin*, 218 U. S. 442	2
Heike v. *United States*, 227 U. S. 131	49
Herman v. *United States*, 257 Fed. 601	49
Hickory v. *United States*, 160 U. S. 408	67, 68
Holmes v. *Goldsmith*, 147 U. S. 150	49
Huff v. *United States*, 228 Fed. 892	12, 49
Hyde v. *United States*, 225 U. S. 347	45
Isaacs v. *United States*, 159 U. S. 487	50
Jennings v. *Phil. R. & W. R. Co.*, 31 App. D. C. 173, 218 U. S. 255	5, 8
Kettenbach v. *United States*, 202 Fed. 377	49
Kirchner v. *United States*, 255 Fed. 301	74
Lovejoy v. *United States*, 128 U. S. 171	67
Lumber Co. v. *Chapman*, 74 Fed. 444	7

	Pages.
Mahoning Valley Ry. Co. v. *O'Hara*, 196 Fed. 945	7
Michigan Ins. Bank v. *Eldred*, 143 U. S. 293	4
Missouri, K. & T. Ry. Co. v. *Russell*, 60 Fed. 501	6
Moffat v. *United States*, 232 Fed. 522	50
Moore v. *United States*, 150 U. S. 57	49
O'Hare v. *United States*, 253 Fed. 538	74
Pettibone v. *United States*, 148 U. S. 197	74
Rex v. *Hicklin*, L. R. 3 Q. B. 360	68
Rex v. *Philpot*, 7 Crim. Apps. Reps. 140	74
Rex v. *Senior*, 1 Q. B. 283	68
Rex v. *Sheppard, Russ & Ryan*, 169	74
Reynolds v. *United States*, 98 U. S. 145	67, 68
Rhuberg v. *United States*, 255 Fed. 865	75
Richmond & D. R. Co. v. *McGee*, 50 Fed. 906	6
Rosen v. *United States*, 161 U. S. 29	74
Rucker v. *Wheeler*, 127 U. S. 85	67
Schenck v. *United States*, 249 U. S. 47	9, 74
Schultz v. *United States*, 200 Fed. 234	49, 50
Simmons v. *United States*, 142 U. S. 148	67
Standard Oil Co. v. *United States*, 221 U. S. 1	49
Starr v. *United States*, 153 U. S. 614	67
Statler v. *United States*, 157 U. S. 277	11
Stern v. *United States*, 223 Fed. 762	49
Texas & Pacific Railway v. *Volk*, 151 U. S. 73	50
Thiede v. *Utah Territory*, 159 U. S. 510	57
United States v. *Anthony*, 11 Blatch. 200	68
United States v. *Blakeman*, 251 Fed. 306	15
United States v. *Mayer*, 235 U. S. 55	9
United States v. *Miller*, 249 Fed. 985	15
United States v. *Patten*, 226 U. S. 525	74
United States v. *Sugar*, 243 Fed. 423; s. c. 252 Fed. 79; certiorari denied, 248 U. S. 578	15
Waldron v. *Waldron*, 156 U. S. 361	5
Williamson v. *United States*, 207 U. S. 425	49, 54
Withaup v. *United States*, 127 Fed. 530	49
Wood v. *United States*, 16 Pet. 342	49
Wright v. *Stewart*, 130 Fed. 905	49

STATUTES CITED.

Judicial Code, section 72 as amended	2
Judicial Code, section 269 as amended	15
Revised Statutes, section 1025	10, 54

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

DANIEL O'CONNELL, DAVID J. SMITH, HERMAN B. SMITH, CARL J. F. WACHER, THOMAS CAREY, and E. R. HOFFMAN, plaintiffs in error,

v.

THE UNITED STATES OF AMERICA.

No. 221.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF ON BEHALF OF THE UNITED STATES.

THE RECORD.

The first question to be determined is, What record is actually before this court in proper form? It appears from the certificate to the bill of exceptions (R. 174) that there is a dispute as to whether said bill was presented in time. Assuming that the bill of exceptions, as contained in the printed record, is before this court, the plaintiffs in error have filed a motion for a certiorari suggesting a diminution of the record seeking to include in the bill of exceptions certain matter which was not contained in the bill as allowed by the trial court. This motion was

granted without prejudice and the question of the right to consider such matter postponed till the hearing on the merits, the excerpts quoted in the motion to be taken as a return to the writ. The plaintiffs in error have also presented a motion for leave to file amended assignments of error, and this motion has been postponed until the hearing on the merits. It is necessary, therefore, to argue the case in a somewhat different manner from that ordinarily adopted.

THE BILL OF EXCEPTIONS.

THE BILL OF EXCEPTIONS CAN NOT BE CONSIDERED BY THIS COURT FOR THE REASON THAT THE TRIAL COURT HAD LOST JURISDICTION TO ALLOW AND SIGN IT.

(*a*) The case at bar was tried in the July, 1917, term of the District Court for the Southern Division of the Northern District of California. (R. 2, 33.)

Section 72, Judicial Code, as amended by the act of May 16, 1916, c. 122, 39 Stat. 122, provides:

> Terms of the district court * * * for the southern division of the northern district [shall be held] at San Francisco on the first Monday in March, the second Monday in July, and the first Monday in November.

Under this statute the July, 1917, term of the district court for the southern division of the northern district came to an end, if not sooner adjourned *sine die*, on the first Monday in November, 1917. *Harlan* v. *McGourin*, 218 U. S. 442, 450.

Judgment in the case at bar was rendered September 29, 1917. (R. 174.)

At that time standing rule No. 9 of said district court provided:

> For the purpose of making and filing bills of exceptions and of making any and all motions necessary to be made within the term at which any judgment or decree is entered, each term of this court shall be, and hereby is, extended so as to comprise a period of three calendar months, beginning on the first Tuesday of the month in which verdict is rendered or judgment or decree entered.

The period of time fixed by this standing rule extension expired in the case at bar on December 4, 1917, i. e., three months from the first Tuesday in September, 1917.

The bill of exceptions was filed December 31, 1917, in accordance with an extension of time granted at a period, namely, December 24, 1917, after the July term, and after the extended time fixed by rule 9, *supra*, had both expired. (R. 175, 176.) There had been a continuous granting of extensions from a period, namely, October 23, 1917, within the July term (R. 174, 175), but these orders had been made ex parte and in chambers (R. 175).

It is claimed that the United States attorney consented to these extensions by procuring an order allowing him to propose amendments to the bill, and by in fact proposing such amendments, but these actions were not taken by the United States attorney

> ning and did not operate to extend the power of the trial judge over the record beyond the term. No order had been made in the term time for the filing of such a delayed bill. Not only had the term closed, but an appeal had been allowed and perfected. The trial court had thereby lost control of the cause, and had no authority to add to or take from the record.

In *Richmond & D. R. Co.* v. *McGee*, 50 Fed. 906, 907, Chief Justice Fuller said:

> The true rule upon this subject is laid down in *Muller* v. *Ehlers*, and is expressed, in substance, in rule 36 of the rules of the United States Circuit Court for the District of South Carolina, which provides for the taking of exceptions on the trial, though the bill of exceptions may be drawn up and settled afterwards; but only "within such times and under such rules as the court, in its discretion, may prescribe *at the time*." (Italics ours.)

In *Missouri K. & T. Ry. Co.* v. *Russell* (C. C. A. 8th) 60 Fed. 501, the facts are thus stated by the court:

> The record shows that a judgment was rendered against the plaintiff in error on the 21st day of April, 1893, at a regular term of the United States court in the Indian Territory held at South McAlester, in the second judicial division of said Territory. Thereafter, on April 26, 1893, before the expiration of the term, an order was duly made and entered of record extending the time for filing a bill of exceptions for 30 days from that date. Before the expiration of the last-mentioned

> period, the term of court lapsed. Afterwards, on May 24, 1893, and again on June 22, 1893, orders were made under the hand and seal of the trial judge, extending the time for filing a bill of exceptions for a period of 30 days on each occasion. Also, on July 8, 1893, a further extension of time was granted until September 1, 1893. The three orders last mentioned appear to have been ex parte orders, which were obtained from the judge in vacation, without notice to the defendant in error, and without his consent. The bill of exceptions was finally allowed, signed, and filed on the 10th of August, 1893.

It was held that the bill did not become part of the record, the court saying:

> We are of the opinion that the trial judge, in the absence of any standing rule of court on the subject, had no power in vacation to enlarge the time for filing a bill of exceptions which had been fixed by an order of court made and entered of record in term time; and, as no consent was given by the defendant in error that the time might be thus enlarged, the orders made in vacation can not operate against him as an estoppel.

A contrary ruling was made in *Lumber Co.* v. *Chapman* (C. C. A. 4th), 74 Fed. 444, 450, and in *Camden Iron Works Co.* v. *Sater* (C. C. A. 6th), 223 Fed. 611, 613, but in the former case there was no standing rule of court, and in the latter no reason is given for the conclusion, but sole reliance is placed on a previous decision, viz., *Mahoning Valley Ry.*

Co. v. *O'Hara*, 196 Fed. 945, which has nothing to do with the case, since there a motion for a new trial was pending undisposed of, which, of course, made the settlement of a bill of exceptions useless.

Where there is a standing rule of court fixing the limit beyond the term within which a bill of exceptions may be prepared and presented, the implication is that the trial judge is without power to extend the period for an indefinite time in the future. This seems to be the true ratio decidendi of *Jennings* v. *Phil. B. & W. R. Co., supra.*

(*c*) No consent was given to the extension by the United States attorney, and if it had been it would have been wholly without effect. In *Jennings* v. *Phil. B. & W. R. Co.*, 218 U. S. 255, 257, 258, this court said:

> So grave a matter as the allowance of a bill of exceptions after the close of the term and after the court had lost all judicial power over the record should not rest upon a mere implication from silence. There should be express consent, or conduct which should equitably estop the opposite party from denying that he had consented.

In the present case there was nothing of the sort. The United States attorney, having previously announced in open court that he would not consent to an extension of time and should move the court to reject the bill, if it was tendered (R. 175, 176), proposed amendments to it when submitted to him. It was his duty to do this to protect the rights of the

United States, if the trial court should hold that the bill was in time.

His actions, however, were immaterial in any event, for if the bill was not presented until after the court had lost jurisdiction the consent of the United States attorney given after that time could not give or restore such jurisdiction. *United States* v. *Mayer*, 235 U. S. 55, 67, 70. The opinion of the trial court rendered at the time of settling the purported bill is indicative of the court's uncertainty. This opinion is respectfully submitted as showing the court's reason for allowing the bill to be presented to this court. (R. 187, 188.)

THE RECORD PROPER.

Assuming that the bill of exceptions was not presented within the proper time, the only matters arising out of the record proper of which complaint is made in the original assignments of error (R. 195–198) are the alleged unconstitutionality of the so-called selective-service act of May 18, 1917, c. 15, and the espionage act of June 15, 1917, c. 30—points no longer open in this court—and that the indictment is bad in charging in the first count (R., 2–4) a conspiracy to obstruct the recruiting and enlistment service of the United States by mere inducement and persuasion—a claim likewise foreclosed by the decision of this court in *Schenck* v. *United States*, 249 U. S. 47, 52, where it is said:

> It seems to be admitted that if an actual obstruction of the recruiting service were

> proved, liability for words that produced that effect might be enforced. The statute of 1917 in section 4 punishes conspiracies to obstruct as well as actual obstruction. If the act (speaking or circulating a paper), its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime. *Goldman* v. *United States*, 245 U. S. 474, 477.
>
> See also *Frohwerk* v. *United States*, 249 U. S. 204, 206.

The motion for leave to file amended assignments of error presents only two additional points arising on the record proper (leaving out of consideration matters already determined by this court in the cases arising under the selective service act and the espionage act), viz:

1. The verdict was defective and the judgment based thereon invalid.

2. The second count charges a conspiracy to make false certificates as to the liability of certain persons for military service under the provisions of the selective service act and to aid certain persons to evade the requirements of said act and of the regulations made pursuant to it, without alleging that the persons referred to were officers or persons charged with the duty of carrying the act into effect. (Motion, pp. 56, 57.)[1]

1. The verdict of the jury is set out in three places: First, in the minutes of the trial (R. 32); second, in

[1] Other alleged defects in the indictment are referred to, but if they existed (as they do not) they would be cured by section 1025 R. S.

the proposed bill of exceptions (R. 177); and, third, in the judgment (R. 193). In order to avoid any misunderstanding we have moved for a certiorari to send up a copy of the original verdict, and we refer to this as reproduced in said motion. From this it appears that the jury were furnished with a printed form on which they wrote in the names of the defendants and the word "guilty," leaving the form otherwise as it was, so that the whole read:

> We, the jury, find Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacher, Thomas Carey, and E. R. Hoffman, the defendants at the bar, guilty on the ——— count of the indictment, and ——— on the ——— count of the indictment.
>
> THOMAS H. HASKINS, *Foreman.*

Such a verdict is clearly good. In *Statler* v. *United States*, 157 U. S. 277, 279, the principle governing the matter is thus expressed:

> The verdict being general and not special, any words attached to the finding "guilty on the first count" are clearly superfluous and are to be so treated. In Trials per Pais (8th ed. 1766, p. 287) the rule is thus stated: "If the jury give a verdict of the whole issue and of more, * * * that which is more is surplusage and shall not stay judgment, for '*utile per inutile non vitiatur.*'" Bishop on Criminal Procedure, p. 623, section 1005*a*, is substantially to the same effect: "The words being 'the finding of lay people' need not be framed under the strict rules of pleading or after any technical form. Any words which

> convey the idea to the common understanding will be adequate; and all fair intendments will be made to support it. To say, therefore, that the defendant is 'guilty,' or guilty of an offense named which is less than the whole alleged, is sufficient, without adding 'as charged in the indictment;' for the latter will be supplied by construction. So, likewise, a general finding of 'guilty' will be interpreted as guilty of all that the indictment well alleges. * * * Surplusage in a verdict may be rejected, being harmless, the same as in pleading; and the verdict must be construed as a whole, not in separate parts." In *Patterson* v. *United States*, 2 Wheat. 221, 225, this court, speaking through Mr. Justice Washington, said: "If the jury find the issue and something more, the latter part of the finding will be rejected as surplusage." *Commonwealth* v. *Judd*, 2 Mass. 329; *Armstrong* v. *The People*, 37 Ill. 459; *State* v. *Yocum*, 117 Mo. 622; *Arnold* v. *State*, 51 Ga. 144; *Henry* v. *Raiman*, 25 Penn. St. 354.
>
> See also *Huff* v. *United States*, 228 Fed. 892, 894. Certiorari denied, 241 U. S. 667.

In *Bellew* v. *United States*, 160 U. S. 187, there was, as in the case at bar, an indictment with two counts charging distinct offenses. The court said (160 U. S. 197):

> The verdict was a general verdict. That in a case such as this a general verdict is proper and imports of necessity a conviction as to both crimes, is settled.

It follows that the verdict of "guilty" in the case at bar was sufficient without more and that the portions

of the printed form left in were mere surplusage which may be disregarded. Those portions were of use only if the jury desired to acquit on one of the counts.

2. The second count of the indictment charges a conspiracy to violate section 6 of the selective service act, the material portions of which are as follows:

> * * * all persons designated or appointed under regulations prescribed by the President, whether such appointments are made by the President himself or by the governor or other officer of any State or Territory, to perform any duty in the execution of this act are hereby required to perform such duty as the President shall order or direct, and all such officers and agents and persons so designated or appointed shall hereby have full authority for all acts done by them in the execution of this act by the direction of the President. * * * *Any person charged as herein provided with the duty of carrying into effect any of the provisions of this act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty; and any person charged with such duty or having and exercising any authority under said act, regulations, or directions, who shall knowingly make or be a party to the making of any false or incorrect registration, physical examination, exemption, enlistment, enrollment, or muster;* and any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the pro-

> visions of this act, or regulations made by the President thereunder, or otherwise evades or aids another to evade the requirements of this act or of said regulations, or who, in any manner, shall fail or neglect fully to perform any duty required of him in the execution of this act, shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, or, if subject to military law, shall be tried by court-martial and suffer such punishment as a court-martial may direct.

While the italicized portion of the section evidently relates only to the officers referred to above as appointed or designated by the President, it is equally clear that the latter portion refers to any person subject to the provisions of the act. This is true because the language used is broad enough to cover any such person, while the general intent of the act justifies, if it does not compel, giving full effect to the general language used, and because, if the unitalicized portion also relates only to the draft officers, it is surplusage, since their derelictions are already sufficiently covered by the italicized portion. The precise question does not seem to have been raised in this court, for the *Goldman Case*, 245 U. S. 474, involved a conspiracy to violate section 5, not section 6, of the selective-service act. In *Fraina* v. *United States* (C. C. A. 2d), 255 Fed. 28, the indictment was based on section 6, and that decision of the Court of

Appeals is sufficient authority for its validity, if authority be needed. See also *United States* v. *Miller*, 249 Fed. 985; *United States* v. *Blakeman*, 251 Fed. 306; *United States* v. *Sugar*, 243 Fed. 423, 439; S. C. 252 Fed. 79, 84, 85; certiorari denied, 248 U. S. 578.

THE RECORD WITH THE BILL OF EXCEPTIONS.

Assuming that the bill of exceptions is a part of the record and therefore before the court, the only questions then raised are:

1. Whether there was any evidence which, taken by itself or with the inferences which the jury were legitimately entitled to draw from it, could have justified reasonable men in finding a verdict of guilty on both counts.

2. Whether any error, duly excepted to, was committed by the trial court in the admission or rejection of evidence, having in mind that such action must "affect the substantial rights of the parties." (Sec. 269, Judicial Code, as amended by the act of Feb. 26, 1919, ch. 48, 40 Stat. 1181.)

1. Both counts of the indictment charged a conspiracy, the first to violate section 3 of the act of June 15, 1917, ch. 30, by obstructing the recruiting and enlistment service of the United States, the second to violate section 6 of the act of May 18, 1917, c. 15, by aiding persons to evade the requirements of said act. The conspiracy, that is, the common concert or combination, had its basis in the organization and actions of an association of persons called "The American Patriots." There is no dis-

pute that such an association was formed, nor that it actively functioned as such. Nor is there any dispute that all of the defendants were members of it. Daniel O'Connell, David J. Smith, and Herman B. Smith were original associates (Ex. 3). The defendant Hoffman joined July 21, 1917, and was elected treasurer the same night (R. 132). The defendant Wacher joined August 6, 1917 (R. 114), and became secretary August 13 (R. 118). The defendant Carey joined July 25, 1917 (R. 162), and acted apparently as a propagandist in the cases of Murphy (R. 162, 163) and Donlon (R. 73, 74, 163). All this is admitted. The only question, therefore, is whether there was any evidence to justify a finding that the purpose, or one of the purposes, of this association was to obstruct the recruiting and enlistment service and to aid persons in evading the draft. Great stress is laid by counsel for the plaintiffs in error on the claim that the purpose of the combination was entirely innocent, viz, to test the constitutionality of the selective service and espionage acts, and that the defendants can not be held responsible for any obstruction of the recruiting service, or evasion of the draft arising therefrom if such result was merely the incidental, unintended effect of their acts. The abstract correctness of this claim is not disputed, but its application to the facts of the case at bar is denied.

Men are not judged by the secret intents of their minds (for, as the old judge said, the devil himself knows not the thoughts of man), but by their acts. The ends which they have in mind may be determined

by the means they adopt to achieve them. Where it is claimed that the sole end in view is lawful, it should appear that no measures were adopted beyond those reasonably necessary to accomplish the lawful end. If that be shown, the persons concerned may safely disclaim any responsibility for incidental results of unlawful actions by others. If this were not true no agitation for reform could be legally undertaken. On the other hand, however, if it appear that means were used in excess of those reasonably necessary to produce the asserted lawful end—means having a natural tendency to produce violations of the law—the persons involved may be judged thereby, their purpose may be assumed to have partly been to produce such violations, and the fact that part also of their purpose was lawful may not excuse them. This is well illustrated by the case of *Debs*, 249 U. S. 211. It was there contended, much to the same effect as in the case at bar, that the real purpose of defendant's speeches was to promote the cause of socialism, of social justice, and of labor as opposed to capital, all lawful ends. It was held, nevertheless, that the jury was entitled to find his speeches in excess of what was reasonably necessary to serve the causes he had at heart, as tending to obstruct recruiting and cause insubordination in the military forces, and to hold him responsible for these results, the Court saying (249 U. S. 212, 213):

> The main theme of the speech was socialism, its growth, and a prophecy of its ultimate suc-

> cess. With that we have nothing to do, but if a part or the manifest intent of the more general utterances was to encourage those present to obstruct the recruiting service, and if in passages such encouragement was directly given, the immunity of the general theme may not be enough to protect the speech.

And again (249 U. S. 214, 215):

> The statement was not necessary to warrant the jury in finding that one purpose of the speech, whether incidental or not does not matter, was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting. If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief.

Another example may be taken from the present condition of the prohibitory liquor laws. It would be in no sense illegal for the liquor dealers, brewers, and those persons resenting a deprivation of personal liberty to form an association to test by lawful means the constitutionality of the Constitution and of the acts of Congress relating to the subject, and if any members of the association or others within its influence were so unfortunate as to be tempted by the thought of the great constitutional issues involved to indulge in "bootlegging" or in the taking of an illicit drink, the leaders of the association could

legally wash their hands of them. If, however, the association denounced the laws and constitutional amendment in question as foisted upon this country by the Mohammedans, as merely a scheme of the unspeakable Turk to extend his power at the expense of our liberties, as the result of a corrupt combination of the manufacturers of coca cola and other "soft" drinks with a venal press dependent on their advertising; if it spread this propaganda by speeches, circulars, moving pictures, etc.; if it made a specialty of inviting to membership those individuals most inclined to view their personal liberty as meaning the right to drink intoxicating liquor, law or no law; and, if, finally, it advised its members that in order to test the constitutionality of the laws and the amendment, it was necessary to buy a drink now and then, or to run a little "blockade" whiskey provided it were not done in such a way as to bring the adventurer into the permanent clutches of the law; if all these things were done, a jury, it would seem, might be justified in finding that one of the purposes of the association was to induce violations of the law, because the means adopted do not seem to be strictly necessary if the only end desired was to induce this court to decide an interesting constitutional question.

This, we claim, is the case at bar. The aims announced by the association called "The American Patriots" in its articles of incorporation were lawful. The means, however, adopted by the defendants under color of this title and incorporation were in excess of anything reasonably necessary to test the

constitutionality of the selective service and espionage acts, and the jury was justified in finding (as by its verdict it has found) that these means had a natural tendency to obstruct recruiting and to aid evasion of the draft, and that therefore one of the purposes of the association or conspiracy was to accomplish these ends.

The association known as "The American Patriots" was formed about July 12, 1917. (Ex. 3, Ex. 6, minutes of meeting July 12.) In so far as the plaintiffs in error are concerned, they were all persons who, before that time, had been opposed to the war, mainly on account of Irish or German sympathies, and had been especially opposed to the selective service act. O'Connell was a member of the American Union against Militarism, and its counsel for California. (R. 34.) During May and June, 1917, he had been in conference with persons who objected to being drafted. "They said they did not want to register; they said they were afraid they would lose their rights. Mr. O'Connell said, 'You register.' *Mr. O'Connell said that registering was merely taking a census*, and then after that you submit to the physical examination. Then the next move was on the part of the Government." (R. 124.) The effect of such advice upon young men subject to the draft, or upon women having sons subject to it (see R. 125), may be imagined. O'Connell's objection to the war plainly came from his pro-Irish sentiments. Donlon says (R. 73): "Mr. O'Connell and I had

judged the war and decided that we didn't want any Irishman to fight in it," and the witness' statement is confirmed by many things, such as the sign on the wagon, and the exemption claims which will be referred to later. Carey was in the same class. Hoffman was of German descent and a sympathizer with the German cause "because I have a feeling for what I consider the under dog; it looked to me like a gang fight." (R. 137. See also R. 136–141.) Wacher, from his name, appears to be of German descent; he filed one of the so-called O'Connell exemption claims (Ex. 12) and believed that England was running this country. (R. 116.) Herman B. Smith delivered a speech on July 3, 1917 (R. 48, 49), the direct tendency of which was to obstruct recruiting and to induce evasion of the draft. David J. Smith was connected with the attempted distribution at a public meeting of the Socialist platform (R. 50, 51)—a publication having a natural tendency to obstruct recruiting, as this court held in *Debs* v. *United States* (249 U. S. 211, 215, 216). Louis Serbin, the assistant secretary, had been arrested for tearing down recruiting posters, and after seeing O'Connell in the jail joined the American Patriots. (R. 110.) Mrs. Kraus, an incorporator and original secretary, changed her name to Malloy, with O'Connell's approval, so as to remove every suspicion of German sympathies. She had a son subject to the draft and wanted O'Connell to tell her "What can be done?" (R. 123, 85.) What she *did* was

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to join the Patriots, but she told O'Connell that her son had flat feet and might not be accepted. (R. 85.) She placed reliance on the examining physicians, as well as on O'Connell and the Constitution.

The above illustrates the characters of the principal persons incorporating and acting under the name of "the American Patriots."

Letters were prepared, such as Exhibit 2, for soliciting membership in the association. There was a mailing list, which apparently was not found or produced. Serbin says it contained about 200 names. (R. 110.) Gray says that while he was there 300 or 400 pieces were sent out. (R. 64.) We have no way of telling to whom these letters were sent, but Gray says that all the members he knew of were either of the draft age or were looking to get somebody else out of the draft. (R. 65.) Serbin testifies that the majority of the members were of draft age and that on a list of 1,250 shown him three-quarters were within the draft age. (R. 111.) This letter, thus sent broadcast to such people with reference to the American Patriots and their objects, stated:

> The American Revolution was fought, won, and the Republic established by "Sons of Liberty," an organized minority, in spite of the opposition of Tories, grafters, and grovelers before wealth and office, in those days, assisted as they were by the purchased press, suppressing the truth and publishing lies, for the purpose of scaring or humbugging the people. At present all that these American

> heroes fought for and won is in extreme danger of being lost. To save the Republic we have therefore organized the AMERICAN PATRIOTS—the name alone covers everything sufficiently—and as evidence that we mean business, we incorporated under the laws of the State of California July 14, 1917, and as the objects and purposes of the corporation, filed with the Secretary of State the following statement: * * *

It then gave the purposes of the Patriots as stated in the articles of incorporation, in which the Constitution is to be maintained and enforced to the last breath, but in which nothing is said of the enforcement of the laws, they presumably being in violation of the Constitution in so far as they are displeasing to the Patriots. The letter concludes:

> It is plain from the above that members of AMERICAN PATRIOTS must be real, genuine patriots, not humbug or "shoneen." No matter where you or your ancestors were born, if you are now an American citizen and a real genuine patriot you are requested to join us at Room 714 Mechanics Building, corner Market and Mason Streets, San Francisco, Cal.[1]

As to whether the circular, in and of itself, did not have a necessary tendency to obstruct recruiting, and to aid evasions of the draft, the Court of Appeals

[1] "Shoneen," according to Murray, is a term of contempt used in Ireland for a small landlord who has or pretends to have an English education or ideas. The American Patriots would have to be recruited from the Irish "Patriots" if they were to understand this term.

for the Ninth Circuit said of a similar publication (*Goldstein* v. *United States*, 258 Fed. 908, 910):

> But, if it has come about that a war is being fought by the United States and in the war the cause of the United States is allied with that of the foreign country whose soldiers are pictured as murdering American women and children, and if, at the time the United States is enforcing draft laws and raising a large army and navy to fight the common enemy of the two allied countries, it seems but reasonable to say that the exhibition of such a picture is calculated to arouse antagonisms and to raise hatred in the minds of some who see it against the ally of the United States, and as a probable effect to put obstruction in the way of the necessary cooperation between the allied countries against the enemy, and to undermine an undivided sentiment for the United States and to encourage disloyalty and refusal of duty or insubordination among the military and naval forces.

Members were also solicited by a wagon drawn through the streets, covered with signs reading:

> John Bull and his agents are ruling and ruining us. What are you doing about it? Join American Patriots, 714 Mechanics Building, Market and Mason. (Ex. 8.)

Some pretense of a claim is made by counsel (Brief, pp. 50, 51) that there was no proof of any connection between the wagon and "the American Patriots." But, besides the decisive fact that the defendants never denied in any way their responsi-

bility for this propaganda (nor for the moving picture slides), the connection is directly admitted and boasted of by O'Connell in his speech of August 21 (defendants' Exhibit D), and the driver of the wagon testified to it. (R. 112. See also R. 106, 141.)

Slides were made use of in 15 moving picture theaters, which, after quoting Webster and Clay to the effect that President Jackson had assumed authority not conferred by the Constitution, concluded:

> Have not Congress and the President done the same in the conscription act of 1917? Save the Constitution and *Yourselves* by joining the
>
> AMERICAN PATRIOTS, INC.,
> *714 Mechanics Bldg., Market and Mason.*
>
> (Ex. 5.)

Here is a direct inflammatory appeal to individuals to save *themselves* from the operation of the conscription act by joining the American Patriots, with emphasis laid on the fact that it is incorporated so as to (as they thought) avoid individual liability.

Public meetings were held which were advertised by such circulars as Exhibit 15. This announced that one Mills would speak on "Shall there be money for war and none for wages?" and that O'Connell would speak on "*True* American patriotism." It further stated:

> The PEOPLE must now save themselves and their liberties by assembling at these mass

meetings and asserting their constitutional rights.

O'Connell spoke constantly at these meetings (see minutes, Ex. 6), and the associates were undoubtedly cognizant of what he said. A sample of his utterances is found in defendants' Exhibit D, being a speech made at a meeting of the American Patriots on August 21. After defining American patriotism as consisting in the support of the Constitution, *as interpreted by O'Connell*, and in the resistance to all laws which departed from the Constitution *as so interpreted*, he said:

> Any newspaper, or person, or individual, or public speaker, who will advocate a policy that is sure to bring ruin and devastion on this country and the people of this country, by calling for millions of its youngest and best men—load it with a debt of seventeen billion dollars this year and forty billion dollars next year, and forty billion after that—load the people with a debt of that kind; is an enemy to the Nation, and is a traitor! (Applause.)

And again:

> Until recently, they thought war was always popular. That is true, when the war is a just one; but not when the people find it is a war of aggression—when the Pope makes an offer of peace and it is rejected, we all know then that it is a war of aggression. That brings us to one of the issues in this case which will soon be tried.

A legal opinion (Ex. 1) was prepared by O'Connell and was made accessible to all members of the association. It is true that some pretense is made by counsel of claiming that this opinion was not prepared by O'Connell and that the copies lying around the office were not identified as being the same as Exhibit 1. Such a claim is idle. Serbin testified (R. 110):

> I saw the legal opinion which was presented to me by Mr. O'Connell for the benefit of members who came up to the headquarters.

Mengedoth got it on a desk in O'Connell's office and gave it back to O'Connell *who produced it, without objection, at the trial.* (R. 36.) Hoffman, one of the defendants, testified (R. 139) that he had a copy of the opinion on hand in the office and that "Mr. O'Connell prepared the opinion in answer to the questions." Wacher, another of the defendants, testified (R. 118) that O'Connell was the legal adviser of the association, and that he saw the legal opinion. Other witnesses testified that it was in the office for the information of anyone interested. (See e. g. R. 106). Moreover, its statements are in exact line with the advice given orally by O'Connell to every person of draft age who consulted him. This opinion, among other things, states:

> 2nd.—Will they report to exemption or examining boards?
>
> Ans.—As the boards might have them take the oath or sign some papers putting them

in the military service the safest way is simply file an affidavit of exemption as the best and safest method of testing the law.

3rd.—If they refuse to go, are they under military law?

Ans.—No, they are not.

4th.—Can the military authorities proceed against them?

Ans.—No.

5th.—What can be done for such refusal to be conscripted?

Ans.—No more than for the commission of any other *misdemeanor*. If they want to prosecute they must make a sworn complaint to the U. S. commissioner, who may issue a warrant and the party can give bail the same as in any other criminal case, and all the questions of fact and law must be tried before a judge and jury.

The military authorities can have nothing to do with it. There can be no proceedings before any court martial, or any other proceedings under military law. The civil law is in full force, and the military law has no force whatever. Only those who have been sworn in as members of the Army and Navy are subject to military law.

The constitutionality of the conscript law will be tried and tested in the trial in the U. S. District Court. If the jury should find the defendants "not guilty," that ends it. If the jury should find them "guilty" then the case will be taken to the Supreme Court of the

United States at Washington, D. C., on the questions of the constitutionality of the law. The case can not be heard there before December or January and a decision may not be rendered until February or March, 1918. If the law is declared unconstitutional that ends it all.

If it is declared constitutional, then the worst that can happen is that the defendants will have to serve a year in jail.

6th.—What after that?

Ans.—Nothing. They can not be twice punished for the same offence and they are free after serving their sentence. But *in the meantime* a new Congress will have been elected and that Congress will be 20 to 1 against the war, and will repeal the conscript law, and also the declaration of war, and make peace so far as the United States is concerned. This will also release any person who might be in jail for resisting the conscript law.

Advice to practically the same effect was given by O'Connell to Mengedoth (R. 34, 37), to Murphy (R. 41, 43), to the persons at the meeting at Lodi (R. 57), to Mettler (R. 59, 60), to Christman (R. 61), etc. Large numbers of mimeographed claims for exemption from the draft were prepared, and one was given to every member of the American Patriots who was subject to the draft. Miss Barkley, the stenographer, testified that she prepared quite a few hundred, and that O'Connell desired for his trip

to Lodi 100 (R. 53). This exemption claim, leaving out immaterial matter, was as follows:

> LOCAL BOARD, FOR DIVISION NO. ——, CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA.
>
> ————————, SAN FRANCISCO, CAL.
>
> CLAIM OF EXEMPTION OF MILITARY SERVICE.
>
> I, ————————, Serial Number ———, not being now, and never having been, in the military or naval forces, or service, of the UNITED STATES OF AMERICA, and not submitting to, or admitting, any jurisdiction in this board, or any other board, or organization, or official, whatever, to in any degree draft, or conscript, me into the military or naval forces of the United States; but specifically denying any and all such jurisdiction in this or any other board, or organization, or official, and objecting to any and all such jurisdiction, and for the purpose of resisting any claim that may be made hereafter that my service, or property, or liberty, or life, is being taken from me by due process of law, or any claim that by any act of mine, or any other person, or board, or official, I had in any degree waived any right to question, and defeat, any claim of power, jurisdiction, or authority to draft, or conscript me into the naval or military forces or service of the United States, I make this particular form of claim of exemption at and from the start, setting up a few of the many grounds, I have therefor, so that any appearance by me

hereafter before any physician, or official, or board, or organization whatever, shall not be construed in any way an admission of, or submission to, your jurisdiction, or authority, but as merely a matter of courtesy and orderly proceeding for the purpose of calmly and legally presenting at the proper time to the proper courts, to wit: The District Court of the United States, the United States Circuit Court of Appeals, and the Supreme Court of the United States, the constitutionality and lawfulness of any of the proceedings of the past, present, or future in enacting or enforcing this draft or conscription law now sought to be enforced: Therefore,

I claim exemption from military service on the following grounds, to wit:

I am a resident of ————————.

1. The act and acts of Congress, and the proclamation of the President of the United States thereunder, and all of the rules and regulations made in the attempt to carry out the said conscription or draft law, are each and all unconstitutional and void, in that the Congress of the United States and the President and Executive Department of the United States have no authority whatever except that expressly granted to them or each of them by the Constitution of the United States, and any law or act or proceeding taken by said Congress or President or Executive Department contrary to the prohibitions in said Constitution, are each and all void, especially as the Constitution was framed and adopted for the purpose of protecting the people and the

liberties of the people against the encroachments of temporary officeholders, and, therefore, said conscription act and law and all said proclamations, rules, and regulations proclaimed or announced by the Executive Department in carrying out any of the provisions of said draft or conscription law, violate the following provisions of the Constitution of the United States, to wit:

1. The first sentence containing the objects and purposes of the Constitution.

2. Section 8 of Article I, of said Constitution and particularly subdivisions 1, 11, 12, 14, 15, and 17 of said section 8.

3. Sections 1 and 2 of Article III of said Constitution.

4. The second paragraph of Article VI of said Constitution.

5. Articles IV, V, VI, IX, X, XIII, and section 1 of Article XIV of said Constitution.

Later on, I shall present in my affidavit, in support of my claim of exemption, a more detailed statement of the facts and particulars upon which the foregoing claim of exemption is hereby made, and for the purpose of laying the foundation for testing all the said rules and regulations, orders, acts, and laws, I am filing with you at this time the foregoing claim of exemption, and whenever there is the slightest danger to the United States or the Constitution of the United States no one will respond quicker or fight better or longer than I will and that without any conscript or draft law, but I am certain that notwithstanding all the humbug and lies published in the newspapers

and other publications of the world, there is not, and can not be, the slightest danger to the United States, as this war is simply a war of aggression, conquest, and greed, on the part of England and England and her agents have secured a vote of Congress assisting them in this war, which vote was in violation of the Constitution, and will be reconsidered by the next Congress, who will have full power and express directions from the people.

Address.

Claims for exemption of this character were made by defendants Wacher (R. 115) and Carey (R. 162, Ex. 19). Murphy and Carey, in addition each claimed that he had a father and mother in Ireland dependent upon him for support. (Exs. 10, 19.) This was false as to Murphy to O'Connell's knowledge (R. 41), and Carey, who took the stand in his own defense, did not testify on the subject (R. 162 et seq.). Neither the selective service act nor the regulations issued by the President in any way whatsoever justified or permitted a claim for exemption of this character. Section 4 of the act dealt with exemptions, and nonliability to service, and articles 18 and 20 of the regulations covered the subject more fully. The only thing remotely bearing on these claims is the provision as to members of well-recognized religious sects or organizations whose creed or principles are opposed to war in any form. None of the defendants

or members of the American Patriots made any such claim. Their consistent, determined attitude was opposition to the draft, their constant claim that there was no legal authority to compel persons to serve in the war with Germany. The preparation, furnishing, and filing of these "O'Connell exemption claims" was the assertion by action of the purposes of "the American Patriots," to be followed by refusal to serve in the military forces if in due course of law, in spite of the exemption claims, they were required to. It is idle to claim to this court that, in order to test the constitutionality of the law or laws to which the association objected, it was necessary that every person of draft age who joined "the Patriots," whether pro-German, pro-Irish, or pro-self, should file this elaborate document denying the jurisdiction of the draft boards, and the right of any one to draft him into the military forces, assigning as the special (and no doubt the real) reason that the war was simply one of agression, conquest, and greed on the part of England, who through her agents secured the passage of the act which would be reconsidered by the next Congress. No reasonable person can doubt that the purpose of these and other actions of like character was to interfere as much and as dramatically as possible with the working of the draft and the success of the war. Gray gave the correct interpretation of defendants' actions when he testified regarding the defendant Hoffman's statements: "The idea was to keep the boys out of the Army, although he did not

say so in plain English." (R. 63, 64.) Hoffman himself testified (R. 135, 136):

> If we had 10,000 members of the draft age in San Francisco, that would mean, speaking proportionately, many millions in the United States. An expression of public opinion of that kind would cause Congress and the administration to act upon the will of the people which is the law of the land. *It would in effect do away with this draft act* because I believe that the law is unconstitutional. If they repealed it, there would be no necessity about testing its constitutionality or unconstitutionality. *No man in the United States is expected to do military service if he doesn't want to.* Whether any member of our organization would submit himself to military jurisdiction depends on whether the law becomes constitutional or not.

Mengedoth was the pastor of a Lutheran church at Lodi and had what he called "conscientious objectors" in his congregation. In fact the testimony showed that they were simply persons of German descent who wanted to keep out of the war. (R. 34, 37, 59, 60, 61, 62, Ex. 18.) Mengedoth went to San Francisco to see O'Connell on their behalf and submitted to him at some time a list of 23 names of persons who wanted to join the association. (Ex. 18.) He read the legal opinion and, at O'Connell's suggestion, advised his clients that O'Connell would come to Lodi and make a speech. This O'Connell did, and in the course of his remarks said:

> Nowhere in that Constitution, nowhere can you find any language authorizing Congress

or any other department to levy any war for conquest or for aggression, for greed, or anything else of that kind—nothing except for the common defense. [Cheers.] * * *

We voted for the declaration of war in Congress; now we go further than that. The official bulletins which are sent out daily from Washington has orders and proclamations and speeches from the President himself going all to the same end—delivering Belgium—saving and restoring Belgium, delivering Russia, crushing Germany, restoring Alsace-Lorraine, and telling the others what they will do with them—all beyond the common defense of this country. Nothing to do with the defense of this country at all, and all a war of conquest and aggression, as well as serving the greedy purposes of Great Britain. * * *

Now, they had no right to declare war for that purpose, and that is the purpose that the war has developed, and every man and woman here sitting as a jury would have to find that as a fact that the war as carried on now is a war of aggression—is a war of conquest—is a war to assist England and her allies in carrying out their purposes. * * *

So then, when I come here now—when we are doing the things we are doing, it is not because of any prejudice. It is because of this: Unless the people of this country are aroused—mark you—are aroused, your Republic is gone and you will have a despotism riveted on you and your children forever. [Cheers.] * * *

If a man wants to join the army, let him go. If he wants to go to Europe, let him go. He can go if he wants to. There are a large number of young men in this city, in the county, State and throughout the nation—men of courage, who are not afraid to fight. If you saw the fine, strapping young fellows that came into my office some months ago, before the registration of June 5—fine, strapping fellows. They gripped my hand, almost crushing my fingers with their iron grip. Yes, they were fine specimens of men, and they said, "Mr. O'Connell, we are not afraid to fight; no one would fight for America any quicker than we would, but we do not believe in this war; we are not afraid to go to jail; we are not afraid to be stuck up before a wall in front of a firing squad, but we do not want to register." *I said, "You register. I think the United States Government has a perfect right to take a census of its inhabitants any time it sees fit, and the registration is only a census." They said, "It is part of the draft act." I said, "Maybe you won't be here, maybe you won't be called, maybe they won't draft you; therefore, you are not hurt by the census."* But they objected, and I said you had better do that, and I think they registered. * * *

Every intelligent person here knows that these young fellows who go across the ocean will never come back. We know that the life in the front trenches is about 48 hours. I wonder if it is 48 hours with those machine guns on both sides throwing bullets so fast that when a man sticks up his head he is gone, and when they stick up their

> whole body to run across "no man's land" to the other trenches, you wonder how they last even 48 hours in the trenches. Every one of these young men who go will never come back; maybe never come back. There may be some who may, but we do not know. Now, then, these men say we don't want to go, because why? Because the law in their opinion—in the opinion of the lawyers, is unconstitutional.

In addition, in answer to questions he gave his usual advice that no one should sign any papers which would bring him into the military service, that the worst result was a jail sentence, and that a new Congress would repeal the law. (R. 57, 58.) The effect of this speech and of the activities of "the American Patriots" is seen in the evidence of Christman, one of these Lodi members (R. 61):

> I wanted the law tested; I did not think the war was right, and I didn't want to go to war. I could not say that Mr. O'Connell said that he would keep us out of the war, but he said if it is unconstitutional there will be no danger of us going into war. I guess he told us how long it would take to get the case to the Supreme Court, but I can not remember how long he said it would be. He told us we might be in jail while the test was being made in the courts. I think I would rather go to jail than go to war. Mr. O'Connell said nothing about that. I heard a speech in Lodi and was in his room before the speech was made. Mr. O'Connell in my presence before we went

> before the exemption board, told us in his office, that if we wanted to test the law, we should not take the oath, and we could take our physical examination, but that we should know what we are signing and not sign anything that puts us in the military service. *He said the reason why it was best to take the physical examination was that we might not be fit to go, and that we would be all over the thing if we were not fit.* He did not say that we would not have to go to jail; he said that we should sign every paper that would not put us in the service.

The general activities of "the American Patriots" are described by Miss Barkley, the stenographer (R. 53–57), and Gray, the bookkeeper (R. 63–66). The former says (R. 53, 54, 55):

> When Mr. O'Connell handed copies of the exemption claims to parties, he would tell them about signing. I could not say the exact words, but one time I heard him tell them not to be afraid, that if they got mixed up to telephone him and he would come down and take care of them at this exemption board. I heard him tell one once not to let them bulldoze him into signing them, or whatever they were supposed to do with them. I mean signing those I had mimeographed. He said they did not have to sign papers; that they should not sign. I don't know what he did say about taking an oath. He said when they took an oath they were liable, and that they should not take the oath. He said in certain cases to sign papers down there and in certain cases

not to sign them. I don't know whether he meant these exemption claims or other papers, or what he meant. * * * Mr. O'Connell told them if they signed a certain paper they would be liable to the draft.

I filled in a lot of these exemption claims, but I don't remember the names of any. I remember the name of McCullough; I don't remember the name of Carey. I frequently filled in the blanks myself on the typewriter. The business was usually conducted in the reception room of Mr. O'Connell's offices. I saw some of the defendants around there; I saw Dr. Hoffman there often. He was secretary and treasurer, I think, of the American Patriots. I have seen defendant Wacker. I don't know whether he was connected with the American Patriots or not. I did not see Mr. Carey or the two Smith boys.

I was not in Mr. O'Connell's office all the time; I simply did the extra work. His work was mostly the American Patriots' work—circular work, both petitions, exemptions, blanks, and letters. I was in and out all hours of the day. As a rule I did work at his office by appointment or he sent for me, either Mr. O'Connell or any of the others up there at his office. Mr. O'Connell, Dr. Hoffman, and Mr. Wacher were talking to people at the office, but I don't know what they were talking about. Mr. O'Connell said if they signed any papers before the board they left themselves liable; that is the way I understood it.

The latter testifies (R. 64):

> I saw at the office a list of names of four or five pages, about 150 names on the list, and they were not members of the organization. Mr. Wacher prepared and mailed literature to the names and addresses on this list; he folded the literature and put them in envelopes, which were Mr. O'Connell's personal envelopes; they were the same as Government Exhibit No. 11, and Exhibit No. 2 was also mailed out by Mr. Serbin. This is all of the literature that I know of being mailed out. I should judge at two different times about 300 or 400 pieces were sent out. * * *
>
> While I was working at the office in the Mechanics Building I saw a number of young men coming in and out of the office, who claimed they were of the draft age. While I was there working Dr. Hoffman and Mr. Serbin were in charge of the office, Serbin being a boy about 15 years of age, who had charge of the office when Dr. Hoffman was away. When these people came in they would ask what the object of the organization was, and Dr. Hoffman would hand them one of those circulars, and then if they paid they were sent to Mr. O'Connell for advice. I heard some of those young men tell Dr. Hoffman that they didn't want to go to war. In answer to that Dr. Hoffman would tell them that there was only one way to do, and that was to test the constitutionality of the act. If they joined the organization they were sent to Mr. O'Connell or taken to Mr. O'Connell. Either Dr. Hoffman or Mr. Serbin took one

> by the name of Mettler and some other boys who came from Lodi over to Mr. O'Connell's office. Lockemeyer, I believe, was the name of one of those boys he brought in. (Government Exhibit No. 18.) Mr. Wacher would take care of the office part of the time during the absence of Dr. Hoffman.

As to the particular defendants other than O'Connell, they were plainly cognizant of these general activities of the association and of O'Connell as representing it. The circulars soliciting membership, the notices and advertisements of meetings, the speeches made at such meetings, the exemption blanks prepared by the hundred and available to any member, the legal advice of O'Connell, all these things were open and notorious—it is the boast of defendants that they were—so that without doubt all connected with the association were familiar with and approved them. Carey and Wacher filed the form exemption claim and testified to their approval of the course of action represented by it. Hoffman's testimony has been in part quoted above, but the whole of it must be read to understand his attitude.

The evidence as to the defendants David J. and Herman B. Smith is not so strong—in so far as the record shows—as that against the other defendants, but it must be remembered that no printed record can faithfully reproduce all the evidence given at the trial, that the jury saw the witnesses, was the sole judge of the truth of their testimony, and was best fitted in every way to detect the inferences to be

properly drawn from the evidence—inferences which might not occur to the mind of the reader of the bare record. David J. Smith, as has been stated above, was connected with the distribution at a public meeting of the Socialist platform which was before the court in *Debs* v. *United States* (249 U. S. 211). He was opposed to the war and to the selective service act, and it is clear that, in his mind, to test the constitutionality of the act merely meant to oppose the law by that means. In this respect the objects of "the American Patriots" were the same as those of the Socialist platform. (See R. 145.)

Herman B. Smith in his speech at Dreamland Rink on July 3 claimed to be merely supporting the conscientious objector, but his idea of that person was as follows (R. 48, 49):

> On September 1 we are going to have a big lottery in this country. They are going to see which ones of us go over there first to be slaughtered. Now, there are a lot of boys who do not want to go. They think it is murder—they do not know why they should be compelled to go and die "somewhere in France." They would undoubtedly be willing to die in America, or to go and take part in the wars of this country. Now these boys, friends, are going to demand that we stand by them. Every one of us here who are above the age must do a share in aiding these boys to stand firm in his conscience, *and say he will not go.* * * *
>
> The government has asked you to buy Liberty bonds, finance the war and give and

> equip our boys to be maimed and killed. But we want to save our boys at home, *to save them from going to that hell in Europe.* Let us stay here and help them. Any money that you pay here tonight, after defraying the expenses of this meeting, will go to save our boys.

Having these views the Smiths naturally joined "the American Patriots," being original incorporators, directors (R. 144), and Herman B., secretary. Immediately after the first meeting on July 12, 10,000 circulars were prepared (minutes of July 12, Ex. 6) soliciting members. These circulars (Ex. 2) are precisely similar to those later used except that they do not contain the pictures at the top. They are signed by Herman B. Smith as secretary pro tem. (his name also appearing at the top) and refer to the meeting of July 17, so that they must have been circulated before that time. Carey received one of them and was induced by it to become a member. (R. 164, 166.) The substance of this circular is given on page 22 of this brief. It is of a character which in and of itself justified the jury in finding it an effort to obstruct recruiting and to aid evasion of the draft. Special emphasis is now placed on it because of the claim of Herman B. and David J. Smith that they both resigned from the association at the meeting of July 17. They admit, however, that they did not do this because they disapproved of "the American Patriots," but because they desired to devote their entire time to kindred

activities (R. 145, 153), David J. to the Socialist Party and Herman B. to the People's Council That such activities were truly kindred to those of "the American Patriots" in so far as the Smiths were concerned is shown, as to David J., by the "Proclamation and War Program" of the Socialist Party (Ex. 16), of which he approved and with whose attempted distribution he was connected; and as to Herman B., by his speech of July 3 at Dreamland Rink. (Ex. 14.) Moreover, the resignation of these two defendants from "the American Patriots" was not admitted. The minutes did not show it, but, on the contrary, failed to show it at the very place where it would naturally appear—viz., where record is made at the meeting of July 17 of the resignation of Herman B. as secretary and its acceptance. No formal or written resignation was shown.

On this state of the testimony the jury, under the principles laid down by this court in *Hyde* v. *United States* (225 U. S. 347, 368–372), might properly find the two Smiths guilty, either because there was sufficient evidence of acts participated in by them even prior to July 17 to show a purpose to obstruct recruiting and to aid evasions of the draft (so that their alleged withdrawal upon that date did not withdraw them from the scope of the indictment), or that the evidence as a whole, including their own testimony, showed beyond a reasonable doubt that they had not by their internal, informal resignations withdrawn their support from the asso-

ciation, nor done any act to disavow or defeat its illegal purpose (225 U. S. 369).

It is submitted, therefore, that there was evidence in the cause which authorized the jury, exercising its function as the judge of the facts, to find a verdict of guilty against all of the defendants on both counts. As has been stated, there is no dispute that the defendants were all members of the association called "the American Patriots." While the ostensible purpose of this association was merely to test the constitutionality of the selective service and other acts of Congress, its open, notorious activities set out fully in this brief were beyond what was reasonably necessary to accomplish this ostensible purpose and had a natural proximate tendency to obstruct the recruiting and enlistment service and to aid evasion of the draft, for which the defendants under the settled rules of criminal law might be held responsible.

2. The only other questions raised on the record (assuming the bill of exceptions to be a part of it) are as to the admission or rejection of evidence. Of these, the only ones which seem to be of any importance whatsoever are as follows:

Error is assigned on account of:

(*a*) The admission of evidence as to David J. Smith's connection with the attempted distribution on June 3 of the Socialist platform and war program (R. 88, Exception 6), the "dodgers" advertising the meeting at Dreamland Rink July 3 (R. 47, Exception 4), and the speech of Herman B. Smith at

said meeting (R. 47, Exception 5). While these acts took place prior to the actual formation of the conspiracy, viz, July 12, when the association called "the American Patriots" was formed, they were nevertheless clearly competent, at least against David J. and Herman B. Smith, as tending to show their intent in joining "the Patriots." The pamphlets containing the Socialist platform and war program were stored by David J. Smith in a room at a hotel with the purpose of distributing them at a meeting on Sunday, June 3, 1917—just prior to the day fixed for registration under the selective draft act. (R. 50, 51.) As has been stated, these pamphlets were the same which were analyzed by this court in *Debs* v. *United States*, 249 U. S. 211. Having in mind this court's opinion in regard to them, it is clear that the wholesale circulation of them by David J. Smith at a time immediately prior to registration day had a tendency to prove an intent on his part to obstruct recruiting and aid evasions of the draft and threw light, therefore, upon the main fact in issue in the case at bar, viz, whether, in joining "the American Patriots" 40 days later, he retained this same intent or had changed his purpose to one of merely testing the constitutionality of the act.

The dodgers or advertisements (R. 47) were so closely connected with the meeting of July 3 to which they referred as to be admissible with reference to it, if Herman B. Smith's speech at the same meeting was admissible; and, besides, these dodgers expressly appealed to "young men of conscription age." As

to the speech made by Herman B. Smith at this meeting, reference is made to the quotation from it on page 43 of this brief. This language was uttered on July 3, just nine days before the time Herman B. Smith joined "the American Patriots." Prior to July 3 Herman B. Smith had met O'Connell and had asked him to speak at this meeting. (R. 149.) David J. Smith was present at the meeting (R. 114, 119, 147), as was defendant Wacher (R. 114). Early in July David J. Smith saw O'Connell in order to engage him as counsel for Serbin, who had been arrested for tearing down recruiting posters. (R. 110, 142, 147.) Then on July 12 David J. and Herman B. Smith became original incorporators of "the American Patriots," directors, and Herman B., secretary. (R. 1 44.) Immediately there were issued 10,000 circulars (Ex. 2) containing the language quoted on page 22 hereof. Moreover, the meeting of July 3 is directly connected with the organization of "the American Patriots" by the testimony of Margaret Molloy Kraus to the effect that she heard Yost speak at this meeting (and of course heard Herman B. Smith also), that through Yost she met O'Connell, with whom she discussed the speech and the constitutionality of the selective-service act, and was thus led to become one of the original incorporators of "the American Patriots." (R. 85, 99, 100.) The same connection between the meeting of July 3 and the organization of "the American Patriots" existed in all probability as to the Smiths also.

Keeping in mind the course and connection of events, it is clear that the evidence regarding the attempted circulation on June 3 of the Socialist platform and war program, and the meeting of July 3 was competent, if not against all the defendants, at any rate against the Smiths, as tending to show their real intent in the organization and activities of "the American Patriots." This is settled by the authorities. *Wood* v. *United States*, 16 Pet. 342, 359–361; *Holmes* v. *Goldsmith*, 147 U. S. 150, 163, 164; *Moore* v. *United States*, 150 U. S. 57, 60, 61; *Allis* v. *United States*, 155 U. S. 117, 119; *Clune* v. *United States*, 159 U. S. 590, 592, 593; *Bird* v. *United States*, 180 U. S. 356, 359, 360; *Williamson* v. *United States*, 207 U. S. 425, 449–451; *Standard Oil Company* v. *United States*, 221 U. S. 1, 76; *Heike* v. *United States*, 227 U. S. 131, 145; *Wright* v. *Stewart*, 130 Fed. 905, 918, 919; *Kettenbach* v. *United States*, 202 Fed. 377, 383, 384 (C. C. A. 9th); *Huff* v. *United States*, 228 Fed. 892 (C. C. A. 5th); *Deacon* v. *United States*, 254 Fed. 259, 260 (C. C. A. 5th); *Herman* v. *United States*, 257 Fed. 601, 603 (C. C. A. 9th); *Withaup* v. *United States*, 127 Fed. 530, 532 (C. C. A. 8th); *Schultz* v. *United States*, 200 Fed. 234, 237 (C. C. A. 8th); *Equi* v. *United States*, 261 Fed. 53, 56 (C. C. A. 9th); *Stern* v. *United States*, 223 Fed. 762, 764 (C. C. A. 2d); *Farmer* v. *United States*, 223 Fed. 903, 911 (C. C. A. 2d).

It may be claimed by plaintiffs in error that while the testimony objected to was admissible to show the intent of the two Smiths it was not admissible against

the other defendants, for the reason that it related to a time prior to the formation of the conspiracy. Such a claim, however, is clearly without force or merit on this record, looked at in any aspect, for it nowhere appears that the plaintiffs in error ever asked the trial court to restrict or limit the evidence to the particular defendants, David J. and Herman B. Smith. (R. 47, 88–90.) It is settled that if the evidence be competent for any purpose it is admissible and that if it be claimed not to be competent for all purposes a specific request must be made of the court to limit it to the particular matter as to which it is competent. *Texas and Pacific Railway* v. *Volk*, 151 U. S. 73, 78; *Isaacs* v. *United States*, 159 U. S. 487, 490, 491; *Goldsby* v. *United States*, 160 U. S. 70, 77; *Ball* v. *United States*, 147 Fed. 32, 40, 41 (C. C. A. 9th); *Schultz* v. *United States*, 200 Fed. 234, 239 (C. C. A. 8th); *Moffatt* v. United States, 232 Fed. 522, 533, 534 (C. C. A. 8th); *Hallowell* v. *United States*, 253 Fed. 865, 867 (C. C. A. 9th). Moreover, in the present case, the trial court expressly charged the jury twice that declarations of a defendant could only be taken as evidence against *him* unless the conspiracy existed at the time they were made, and the declarant was at that time a member of it.

Error is also assigned on account of:

(*b*) The rejection of evidence as to authorities, brought to the attention of defendants, to the effect that the selective service act was unconstitutional (Ex. 11, R. 140; Ex. 13, R. 149; Ex. 15, R. 161; Ex. —, R. 166; Ex. 23, R. 169, 170; Ex. 24, R. 170; Ex.

25, R. 170; Ex. 26, R. 170, 171; Ex. 27, R. 171; Ex. 28, R. 171). Assuming that the various authorities referred to were not, as a matter of fact, sufficiently brought to the attention of the jury in other ways (as, in fact, they were), it is submitted that the rulings of the trial court were correct. The issue before the jury was whether part of the intent of the defendants in their association was to obstruct the recruiting service of the United States and to aid evasions of the draft, or not. As bearing upon this, evidence of their knowledge or means of knowledge of surrounding facts and circumstances bearing upon the matter would be relevant. The evidence now in question, however, offered and rejected, merely tended to show their knowledge or means of knowledge of the interpretation placed by certain authorities on the war powers of Congress under the Constitution, with special reference to the selective service act of May 18, 1917. Such evidence would not have any tendency to show an absence of intent in the defendants to obstruct and resist the act which the defendants had reason (so it is claimed) to know to be unconstitutional. It was not disputed that the defendants believed (in so far as they thought about the matter at all) that the act was unconstitutional, nor that part of their intent in their association was to test its constitutionality. But an absence of an intent to go further, and to obstruct and resist the execution of the act, would not be shown, even remotely, by the presence of knowledge, belief, or intent as to its constitutionality. On the contrary, the clearer their

knowledge and the firmer their belief that the act was unconstitutional, the likelier it would be that their intent would not stop with a mere formal testing of the constitutionality of the act in the courts, but would extend to the obstruction of an act which they were advised and strongly believed to be beyond the power of Congress to enact.

Moreover, the reception of such evidence would tend, almost inevitably, to surcharge the record with testimony pro and con on what the defendants had read, how carefully they had read it, what the authorities in question really held on the particular subject, and what weight they legitimately carried.

(c) The rejection of evidence as to statements by the defendant O'Connell, and conversations with him tending to show his attitude toward the selective service act and the proper limits of resistance to it. (Ex. 9, R. 120, 121; Ex. 10, R. 125; Ex. 15, R. 167; Ex. 16, R. 167; Ex. 17, R. 167; Ex. 18, R. 167; Ex. 19, R. 168; Ex. 20, R. 168; Ex. 21, R. 169; Ex. 22, R. 169.)

In so far as these statements and coversations merely tended to show knowledge or means of knowledge on O'Connell's part as to the unconstitutionality of the selective service act, they are covered by what has been said above.

In so far as they tended to show O'Connell's intent in the organization and activities of "the American Patriots," even if such self-serving declarations of a defendant be admissible in a criminal case, it is clear that the plaintiffs in error suffered no prejudice, nor

were their substantial rights affected by the exclusion of the testimony in question. No offer was made by the defendants in connection with this testimony to show specifically what the witness would testify if permitted to answer—a lack sufficient in and of itself to justify a refusal to review the rejection of the testimony on writ of error. It can only be inferred, with fair certainty, that it was desired and expected to show O'Connell's statements that he believed the law to be clearly unconstitutional, that he only desired to test that question in the courts, that he could not afford to do it alone or to employ, as would be necessary, associate counsel, that he had no client who would advance the requisite money, that therefore it was necessary to incorporate an association in order to raise the necessary funds for this sole purpose, and that for this reason "the American Patriots" was organized. But testimony directly to this effect, giving O'Connell's statements as to his beliefs and purposes, and as to his object in organizing and pushing "the American Patriots," was admitted by the trial court over and over again, so that the jury was fully advised on the subject. (See Rec. 63, 86, 100, 104, 109, 111, 120, 121, 122, 125, 126, 133.) Even if, therefore, the court erred, as an abstract proposition of law, in the exclusion of the particular evidence in question, the evidence was merely cumulative to such an extent that its exclusion can not have prejudiced the case of the defendants, nor prevented them from getting their theory of it fairly before the jury.

(*d*) Exception 1 (R. 38) is to the overruling of the demurrer to the indictment. Everything which seems to us of importance in this exception has already been discussed on pages 9, 13–15 hereof. If there be any other matters in the indictment which are complained of, they are clearly covered by section 1025, R. S.

(*e*) Exception 2 (R. 39) is to the admission of a list of applicants for membership in "the American Patriots." It is clearly without merit in view of the subsequent testimony as to the organization of the corporation and the connection of the defendants with it. The same is true as to the evidence regarding the moving picture films, the contract for their exhibition, and the theaters at which they were shown (R. 39, 40), let alone the fact that no exception was taken to the introduction of any of this testimony.

(*f*) Exception (R. 70) is to permitting a question as to whether a witness, a member of "the American Patriots," and subject to the draft was willing, at the time he testified, to enter the military service. The question was clearly competent as showing the purpose and natural effect of the conspiracy charged. Indeed, the ruling of the trial court seems to fall directly within the principle laid down in *Williamson* v. *United States*, 207 U. S. 425, 450.

(*g*) Exception 14 (R. 165) is to the remark of the trial judge in the presence of the jury to the effect that the statement in the last paragraph of the

"O'Connell exemption claims," that the war was merely one of greed and aggression on the part of England, etc., was outside of and unnecessary to any claim of legal right on the part of the person claiming exemption. Since neither the law nor the regulations recognized or permitted exemption upon any such ground, it was the duty of the court to so instruct the jury, and his remark therefore is subject to no just criticism.

THE MOTION OF PLAINTIFFS IN ERROR FOR A DIMINUTION OF THE RECORD AND THE AMENDED ASSIGNMENTS OF ERROR.

(*a*) On June 2, 1919, the plaintiffs in error filed a motion for diminution of the record, in which they set out at length what purported to be extracts from the record of the trial. These extracts dealt with the admission of certain evidence to which the plaintiffs in error claim to have excepted (Part I, p. 4); with selected portions of the charge to the jury to which they likewise claim to have excepted (Part II, pp. 7 to 17); and to certain action of the court as to which it is not even claimed that exception was taken (Part III, pp. 17 to 19). This motion was granted by this court, *without prejudice*, with the provision that the excerpts from the record stated in the motion should be taken as a return to the writ.

At or about the same time the plaintiffs in error filed a motion for leave to file amended assignments of error, the motion setting out the assign-

ments at length, which number, according to our count, 104.

On this, the questions are: What is the record actually before this court, and How can the case be most intelligently considered and properly decided, if this court be of the opinion that it should go outside of the regularly authenticated bill of exceptions and take cognizance in some way of the entire proceedings in the court below?

(*b*) Attention is called to the fact that the motion to diminish the record was supported as to its statements of fact merely by the affidavits of two of the plaintiffs in error, and that it was granted without prejudice to the rights of the United States. On January 7, 1919, this court refused to issue a writ of mandamus to compel the trial judge to settle and sign a supplemental bill of exceptions, thus in effect upholding the authority and power of the trial judge in his certification (R. 188) that the bill of exceptions was correct and especially in his certification (R. 172) as to exceptions to the charge. It can not be that this ordinary exercise of a fundamental trial function by the judge, sustained as above stated by this court, can now be entirely disregarded in a court of error through the instrumentality of a motion based on affidavits of interested parties to the cause. To permit this would be in effect to change the entire nature of the functions and duties of courts of error and convert the hearing on error into a trial *de novo* of the entire

cause. We submit, therefore, that since the bill of exceptions shows that the plaintiffs in error did not except to the rulings or actions of the trial judge in any of the matters referred to in their motion for a diminution of the record, nor indeed except to any other matters than those already discussed in this brief, this court will not on proceedings in error go *dehors* the record and, in contravention of the official certificate of the trial judge, treat as properly excepted to and assigned for error the matters not of record set up in the motion for a diminution of the record and referred to also in the amended assignments of error. *Claassen* v. *United States*, 142 U. S. 140, 147, 148; *Thiede* v. *Utah Territory*, 159 U. S. 510, 522, 523; *Clune* v. *United States*, 159 U. S. 590, 593, 594; *Drumm Co.* v. *Edmison*, 208 U. S. 534, 540. It further appears in this record that to the bill of exceptions *tendered to the judge*, a large number of objections were made by the Government which were sustained on the bill of exceptions settled as certified by Judge Van Fleet. It is reasonable to presume that the matters now sought to be injected were passed on and excluded. (See petition for mandamus, from which this clearly appears.) The entire bill of exceptions being at the time before this court, it affirmatively appears that the matters sought to be now brought into it were *not matter* of record below and therefore not properly the subject matter of a suggestion of diminution of record.

This court had previously denied an application for mandamus to compel Judge Van Fleet to certify an enlarged bill of exceptions.

(*c*) If this court, however, deems it proper to consider these matters outside of the record so called to its attention by the plaintiffs in error, we submit that the entire transcript of the proceedings below in so far as they relate to the matters set up in the motion to diminish the record and in the amended assignments of error should be before the court for consideration; and we have, so that this may be done, moved to supply them by including certified copies of (c^1) the proceedings relative to the admission of the records in the Cohen and Gambo cases (see R. 74), and (c^2) the entire charge of the court and the proceedings relative thereto. We submit that if these matters are to be gone into at all, the court should have the benefit of all the data which may be helpful to a correct decision of them.

Assuming, therefore, that all the papers and records referred to above are before the court, we shall discuss them as stated in the motion for diminution of the record, adopting, however, a slightly different order.

(1) THE ADMISSION IN EVIDENCE OF THE RECORDS IN THE COHEN AND GAMBO CASES. (Motion, Pt. I.)

The bill of exceptions (R. 74, 75, 76) shows that these records were received in evidence and that no exception was taken by the defendants to this action. The motion to diminish the record claims that an exception was duly saved. The transcript of what

actually occurred shows conclusively the inaccuracy of this claim. It shows that the defendants formally and deliberately withdrew their objection to the testimony upon the statement of the court that they would be permitted to explain the impossibility of testing the constitutionality of the act in these two particular cases. And the transcript is borne out by the bill of exceptions which shows (R. 111, 112) that Cohen, the defendant in one of the cases, testified on behalf of the plaintiffs in error in explanation of his case.

It is not necessary, therefore, to say that the evidence in question was clearly competent as tending to show O'Connell's intent, who was found, some time between June 5 and June 27, filing a demurrer attacking the constitutionality of the act on every conceivable ground and (R. 76) mixing this legalistic attitude with his usual claim that the act forces persons to go to foreign countries, from which they never will return, in order to assist those countries in a war of aggression and conquest.

(2) INTERRUPTION OF THE CROSS-EXAMINATION OF DAVID J. SMITH. (Motion, Pt. III.)

The fact is that there was no interruption whatever. The court adjourned for the noon recess during said cross-examination, and on resuming the bench merely decided the pending case of Mettler before proceeding with the case of the plaintiffs in error. The latter, as the motion for a diminution of the record shows (p. 19), never conceived that such action of the court justified any exception on their part.

(3) THE CHARGE TO THE JURY. (Motion, Pt. I.)

I. The first subparagraph of Part II of the motion (pp. 7, 8) selects for separate consideration a portion of the charge placing before the jury the theory of the Government's case. The only objection to it stated by plaintiffs in error is to the last sentence, where the court charged that if the jury found the theory of the Government "sustained" by the evidence they should find the defendants guilty, when he should have stated (so it is claimed) that the said theory must be proved beyond a reasonable doubt. This assignment is supplemented by the remarkable and wholly unjustifiable claim of a presumption that the judge never charged the jury as to the extent of the burden of proof, since, if he had, the Government would have insisted upon the insertion of the entire charge in the record. In other words, the plaintiffs in error, having never taken any exception to the part of the charge of which they complain, can now erect on their own neglect a presumption of neglect on the part of the Government and of the court.

So far from neglecting to correctly charge the jury on the subject of the burden of proof and its extent, the trial court, after previsioning the matter throughout the earlier part of his charge, concluded his summing up of the case in the following emphatic language:

> Now, as I have said, the burden of proof in this case is upon the Government. The law, in its charity, presumes the innocence of a defendant, and that presumption abides

with him throughout the trial, and until his guilt is established by the evidence. This is a humane provision of the law which is intended for the protection of the innocent and to guard, so far as human agencies can, against the conviction of those unjustly accused of crime. Before a conviction may be had it is incumbent upon the Government to prove each fact essential to the guilt of a defendant by evidence which satisfies the minds of the jury beyond what is termed in the law a reasonable doubt, and that means by evidence which satisfies their minds to a moral certainty, and which accords with their reason and judgment to an extent which would induce them to act in the important affairs of life. If, therefore, after a full consideration of the evidence presented, the jury are conscientiously able to say that they entertain such a doubt as to the guilt of the defendants on trial, or any one or more of them, they must resolve that doubt in favor of any such defendant by an acquittal; and if you entertain such doubt as to all the defendants, then you should acquit them all.

But you will not understand from this that the Government is called upon to make a case free from any possible doubt, that is, to prove the guilt of the defendants on trial to an unassailable demonstration. Such is not the law, for such proof is rarely obtainable in dealing with human transactions; in other words, the doubt which will justify your hesitation must be based in reason and arise upon the evidence, and not consist of a mere hesi-

tation growing out of your sympathies, or based upon something other than a fair and impartial consideration of the evidence in the case. * * *

Now, gentlemen, I have stated to you all that I desire to so far as the specific principles applicable to this case are concerned. The evidence is all before you; the issues are not complex, and in my charge I have tried to simplify them as much as possible for your guidance. As I have said, you are the triers of the facts, and to you the evidence has been addressed, the court simply regulating the admission.

If during the trial in any ruling made by the court, or in any expression of its views on a question arising, or by questions asked of a witness, you have gathered any impression that the court was expressing its judgment either as to the guilt of the defendant, the credibility of a witness, or as to any other matter which the law rests in your hands, you are to entirely ignore any such impression and base your verdict solely and alone upon your own independent judgment as to what the facts are in the case.

The case is now ready for your consideration, but there are one or two suggestions I wish to make as to your duty in that regard. You should one and all go to your jury room with open minds, ready and willing to discuss the case freely and fully with your fellows in order to reach a conclusion; and above all things be certain before you bring in your verdict that it is based solely and alone upon

> the evidence in the case and to no extent upon any extraneous consideration. To permit any bias, on the one hand, or prejudice, on the other, flowing from outside considerations or your sympathies, to find reflection in your verdict would be a violation of your oaths and result only in a miscarriage of justice. To give heed to such consideration and disregard the evidence would be at once at variance with your duty and a reflection upon the jury system. The defendants and the Government alike and equally are entitled to a fair and impartial trial upon the evidence—nothing more and nothing less. If, therefore, the evidence in this case establishes the guilt of these defendants or any of them beyond a reasonable doubt such as I have defined to you, it will be your duty to so find unhesitatingly and entirely regardless of what your sympathies may dictate. If, on the other hand, a reasonable doubt is left upon your minds as to their guilt or that of any one or more of them, then the benefit of that doubt can be accorded only by an acquittal.

When, therefore, the charge is read as a whole it is seen to be unimpeachable in the respect complained of by the plaintiffs in error.

II. The second subparagraph of the motion (pp. 8, 9) separates out another portion of the charge in which the court said that there was evidence before the jury which was "sufficient in its legal tendency" to sustain the Government's theory. It may be (we do not admit that it is) possible that the language

the opinion directly incited to disobedience and resistance to the law, and was adapted to that purpose, while not in the least adapted to or necessary for a testing of the law in the courts. The same is true in every respect of the exemption claims.

The same considerations apply in reason and principle to the remarks of the judge relative to the circulars and to the speeches of Smith and O'Connell. He had an equal right and duty to instruct the jury that these acts were not within the right of the defendants to test the constitutionality of the act, i. e., were not steps proper and adapted to that end—as they clearly were not. Having thus removed this excuse put forth by the defendants for these acts, in so far as the legal, external aspect of it was concerned, it was natural and proper that the judge should go on and charge that such acts had "a tendency," were "well calculated" to obstruct the execution of the selective-service act. It should be borne in mind that the judge not only charged generally as to the burden of proof and the function of the jury in the language quoted above, but also charged specially as to each one of these matters that it was for the jury to determine, in the light of all the testimony, what the real purpose and intent of the defendants were, e. g., in regard to the exemption claims:

> You have a right, therefore, to consider it in the light of all the other facts and circumstances in the case in determining whether the purpose of the defendants in putting it forth was the legitimate and innocent one they claim

> or was in fact intended to subserve the purpose claimed by the Government of provoking and inducing obstruction to the enforcement of this selective-service law.

In *Rucker* v. *Wheeler*, 127 U. S. 85, 93, Mr. Justice Harlan, delivering the opinion of the court, said:

> It is insisted by the plaintiff that the court went too far in its expressions of opinion upon the evidence bearing upon this issue, and that what was said had practically the effect of taking the case from the jury. It is no longer an open question that a judge of a court of the United States, in submitting a case to the jury, may, in his discretion, express his opinion upon the facts; and that "when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury," such expressions of opinion are not reviewable on writ of error. *Vicksburg &c. Railroad* v. *Putnam*, 118 U. S. 545, 553; *St. Louis &c. Railway* v. *Vickers*, 122 U. S. 360; *U. S.* v. *Reading Railroad*, 123 U. S. 113, 114.

Such is the established doctrine and practice of this court on writs of error. *Reynolds* v. *United States*, 98 U. S. 145, 167, 168; *Lovejoy* v. *United States*, 128 U. S. 171, 173; *Simmons* v. *United States*, 142 U. S. 148, 155; *Coffin* v. *United States*, 162 U. S. 664, 679–682; *Allis* v. *United States*, 155 U. S. 117, 123. The cases cited by plaintiffs in error, namely, *Hickory* v. *United States*, 160 U. S. 408, and *Bird* v. *United States*, 180 U. S. 356 (see also *Starr* v. *United States*, 153 U. S. 614, 624, 625), merely decide that the trial court must not, under guise of stating his opinion,

argue the case for one side or the other. If the charge of the trial judge in the case at bar, when fairly read as a whole, crossed "the line which separates the impartial exercise of the judicial function from the region of partisanship where reason is disturbed, passions excited, and prejudices are necessarily brought into play" (*Hickory* v. *United States*, 160 U. S. 408, 425), then, of course, it is indefensible. We submit that it did nothing of the kind but merely commented in a judicial manner upon the case as the evidence disclosed it, for the guidance of the jury. If it was severe upon the defendants, it was a severity induced by their own acts of which they are not in a position to complain, and justified, as this court said of the charge in *Reynolds* v. *United States ubi supra*, as an effort "not to withdraw the minds of the jury from the issue to be tried, but to bring them to it; not to make them partial, but to keep them impartial."

IV. The excerpts from the charge given in subparagraphs VIII and IX of the motion (p. 15) do not seem to deserve, or indeed invite, serious consideration, unless it be in the remark of the judge in VIII and also in X (p. 16), that the honesty of the views of the defendants or their ignorance of the legal consequences of their acts did not, as matter of law, excuse them. This is clearly correct. (See *Rex* v. *Hicklin*, L. R. 3 Q. B. 360; *Rex* v. *Senior* (1899), 1 Q. B. 283; *Reynolds* v. *United States*, 98 U. S. 145; *United States* v. *Anthony*, 11 Blatch. 200, 207, 208; *Fraina* v. *United States*, 255 Fed. 28, 36.) As we have stated before, the main, if not the only,

defense before the jury was that the plaintiffs in error acted under the honest belief that the law was unconstitutional, that the courts would so hold or that Congress would on that account repeal it, and that what they did was necessary to effectuate this honest belief. The authorities cited above show how important the courts have deemed it to explain clearly that such honest, moral, or even religious belief is no excuse for acts which by a natural sequence of cause and effect involve a violation of law, and the trial judge was, therefore, in duty bound in the case at bar to charge the jury to that effect.

V. Subparagraph XI of the motion (pp. 16, 17) separates out a colloquy between the trial judge and O'Connell, as representing the defendants, in which the court stated that a man is presumed to intend, *not the incidental, but* the ordinary, natural consequences of his acts, and that ignorance of the law does not excuse. In so far as this latter principle is concerned, it has just been sufficiently discussed. As to the former it is necessary to see, taking the charge as a whole, exactly what the judge said on the subject. In the first place, the portion of the general charge referred to by O'Connell in subparagraph XI, p. 16, of the motion succeeded immediately to the reference to O'Connell's speech at Lodi, and was as follows:

> These things to which I have called your attention you have a right to consider with all the other evidence in the case in determining the purpose for which they were done, and

if you find that they tended to obstruct this law and were committed by the defendants in the course of a combination or conspiracy between them to accomplish the purpose charged, then the defendants or any of them who were parties to such conspiracy would be guilty and you should so find. In reaching your verdict, however, you must consider all the evidence in the case, that for the defendants and that for the Government; it is to be all taken into account and your verdict based upon it as a whole. I should add, however, to what I have said as to determining the purpose or object of the defendants in any acts they did, what I said with reference to conspiracy; that is, if you should find that the effect of those acts, under the principles I have stated, was to obstruct the recruiting or enlistment service of the United States, then if you find that those acts were deliberately and intentionally done by the defendants, it would make no difference under the law that defendants did not actually know that those acts would result in a legal sense in obstructing the execution of the law. Men are presumed to intend the ordinary consequences of their voluntary acts, and, as I have before said, ignorance of the law is no excuse for crime.

In addition the court said:

There is nothing difficult to understand in the term "conspiracy" as used in the statute and in the indictment. So far as this charge is concerned, a conspiracy is an agreement or understanding between two or more persons

to do or accomplish an unlawful act. Wherever two or more persons act together understandingly for such an unlawful purpose there is a conspiracy, although there may not have been a word spoken between them regarding it. Every scheme to commit an offense against the United States in which two or more persons cooperate understandingly to carry it out is a conspiracy in fact and effect. And this is true even though the parties to the scheme or understanding may not at the time be aware that their acts will render them in law guilty of a conspiracy. If they are knowingly working together to a common purpose and that purpose is the illegal act charged as their object, they are as guilty as though they were perfectly aware that their acts amounted in law to an unlawful conspiracy. Ignorance of the law is no defense to an unlawful act willfully done and it is therefore immaterial that the party committing such an act may not in fact be cognizant of its legal consequences. In the present case, therefore, if you find that these defendants were intentionally working together to a common purpose in doing the several acts charged and that those acts were of a character which did or would result in obstructing the recruiting or enlistment service of the United States, either by inducing persons liable to service thereunder not to conform to or submit to the requirements of the law, or to refuse to be enlisted or recruited in the military service of the United States, then they would be guilty of conspiring to commit

the offenses charged in the indictment. And this would be true although the term "conspiracy" may never have been employed between them, and although no suggestion may ever have been made by any one of them that their purpose was to obstruct or interfere with the execution of the statute in question.

There are some considerations involved in this defense, however, and some features of the evidence in the case which it is proper for the court to call to your attention. The defendants, in common with all other citizens, have a perfect right, in good faith and for an honest purpose, to question the validity or constitutionality of a law affecting their property or their life, liberty, or happiness; and they may do this individually or through the instrumentality of a corporation honestly formed, to secure financial aid for the purpose. But in whatever form the attack is made they must take care that the steps taken and means adopted to that end are legal and proper means and not such as to transgress the laws of the country.

No one is at liberty, no matter upon what claim or pretense of right, to knowingly obstruct or resist the execution of the laws of the country or induce others to do so. To apply these principles to the present charge, no matter how honestly and firmly the defendants may have believed that the selective service law was unconstitutional and no matter how earnestly they may have desired to have the question determined in the courts, they would not be justified either to enable them to secure finan-

> cial aid or for any other purpose to obstruct and prevent its execution by inducing others through improper means to resist or refuse to conform to its requirements. Neither the right of the citizen to resort to the courts for a redress of his grievance nor his right of free speech, as guaranteed by the Constitution, confers any right in the exercise of either of those great privileges to use them as a medium through which to wantonly resist or obstruct the execution of the laws. Free speech, as I had occasion to indicate to you earlier in the trial, does not extend to the privilege of doing or saying that, either in speeches or writings or other medium of expression, which is calculated and intended to excite in the public mind opposition to a law or measure to an extent that will prevent or obstruct its execution by those whose duty it is to carry it into effect. That is not free speech.

In other places the trial judge interwove into his remarks the idea that as a condition to liability the purpose or intent of the conspiracy and of defendants' acts must have been to cause obstruction to recruiting or to aid evasions of the draft, as charged in both counts of the indictment. (R. 2, 3, 4, 5.)

We respectfully submit that, when the charge is read fairly and as a whole, it will clearly appear that the language of the judge accurately stated the settled, approved rule of criminal liability, viz, that, while the defendant can not be properly convicted unless his acts were accompanied with a criminal intent—*mens rea*—yet the jury may presume such

an intent from the circumstances of the case as proven before them, not accepting necessarily the defendants' statement on the matter; and may, therefore, presume that the defendant intended the result which his acts would naturally and with proximate probability bring about. Such presumption, as the trial court pointed out, while strong, is not conclusive but may be rebutted; and to this end each of the plaintiffs in error except O'Connell took the stand in his own behalf and was permitted to testify fully as to his real intent, while O'Connell's declarations on the subject were many times testified to. Charges in all substantial respects similar to or stronger than that in the case at bar on the matter of criminal intent have been sustained by the highest authority. (*Rex.* v. *Sheppard* (1810), Russ & Ryan 169; *Rex* v. *Philpot* (1912), 7 Crim. Apps. Reps. 140, 144; *Boyd* v. *United States*, 142 U. S. 450, 455, 456; *Pettibone* v. *United States*, 148 U. S. 197, 207; *Rosen* v. *United States*, 161 U. S. 29, 41; *Allen* v. *United States*, 164 U. S. 492, 496; *Agnew* v. *United States*, 165 U. S. 36, 49–51; *Aiken* v. *Wisconsin*, 195 U. S. 194, 205, 206; *United States* v. *Patten*, 226 U. S. 525, 543; *Schenck* v. *United States*, 249 U. S. 47, 51; *Frohwerk* v. *United States*, 249 U. S. 204, 209; *Debs* v. *United States*, 249 U. S. 211, 212, 213, 214, 215, 216; *Abrams* v. *United States*, 250 U. S. 616, 621; *O'Hare* v. *United States*, 253 Fed. 538, 540; *Doe* v. *United States*, 253 Fed. 903, 906; *Fraina* v. *United States*, 255 Fed. 28, 36, 37; *Kirchner* v. *United States*, 255

Fed. 301, 305, 306; *Rhuberg* v. *United States*, 255 Fed. 865, 869, 870, 871.

There is no reason to suppose, moreover, that, if the plaintiffs in error had in fact excepted and pointedly called the trial court's attention to the portions of the charge of which they now complain, the court would not have added thereto anything necessary (if anything was necessary) to make clear to the jury that an intent to do the things which the law prohibited was essential to a conviction.

CONCLUSION.

The plaintiffs in error had a fair trial, no errors were committed by the court which affected prejudicially their substantial rights, there was evidence which made the case one proper for the determination of the jury, and the judgment of the lower court should, therefore, be affirmed.

ROBERT P. STEWART,
Assistant Attorney General.
W. C. HERRON, *Attorney.*

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O'CONNELL ET AL. *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 221. Argued April 23, 26, 1920.—Decided May 17, 1920.

A standing rule of a District Court extended the term for the purpose of making and filing bills of exceptions and another provided that the time allowed by the rules might be extended by order made before its expiration but that no such extension or extensions should exceed thirty days in all, without the consent of the adverse party.

Held, that the court lost its power to receive and settle a bill of exceptions when the term as extended by rule had expired and when a further period of less than thirty days, allowed by order made before such expiration, had also expired; notwithstanding further attempted extensions, each ordered before expiration of its predecessor. P. 145.

Amendment of assignments of error may be allowed on motion, in proper cases. P. 147.

The constitutionality of the Selective Service and Espionage Acts and the criminality of conspiracies to obstruct recruiting and enlistment by persuasion were settled by decisions of this court announced since the writ of error herein was sued out. *Id.*

In a trial on two counts the verdict, written apparently on a printed form, declared the defendants "guilty on the — count of the Indictment, and — on the — count of the Indictment." No objection was made until after the case came to this court. *Held*, that all parties evidently understood it as a general verdict and that the informality did not make it fatally defective or the sentence, on both counts, invalid. P. 148.

That part of § 6 of the Selective Service Act providing "any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this Act, or regulations made by the President thereunder, or otherwise evades or aids another to evade the requirements of this Act or of said regulations," applies to persons who are not officers or charged with the duty of carrying the act into effect. *Id.*

Affirmed.

THE case is stated in the opinion. The second count charged that the defendants conspired to make and caused to be made false statements and certificates as to their liability and as to the liability of certain other persons, named or unknown, for military service under the Selective Service Law and regulations, and to aid and abet such persons, they being of draft age and liability, to evade the act and regulations, and particularly to aid and counsel them to refuse and fail to present themselves for the physical examinations, and for military service when called, etc., with overt acts.

Mr. Gilbert E. Roe, with whom *Mr. Joseph L. Tepper*, *Mr. Seth Shepard, Jr.*, *Mr. David Jay Smith*, *Mr. Herman B. Smith* and *Mr. T. C. West* were on the briefs, for plaintiffs in error.

Mr. Assistant Attorney General Stewart, with whom *Mr. W. C. Herron* was on the brief, for the United States.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Plaintiffs in error were tried under an indictment with two counts. The first charges a conspiracy to violate the Espionage Act,—§ 3, Act June 15, 1917, c. 30, 40 Stat. 217, 219—by obstructing the recruiting and enlistment service; the second a conspiracy to violate the Selective Service Law—§ 6, Act May 18, 1917, c. 15, 40 Stat. 76, 80.

A demurrer, challenging the constitutionality of both acts and the sufficiency of each count, was overruled.

The trial continued from September 12 to 25, 1917, and resulted in the following verdict: "We, the jury, find Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacher, Thomas Carey, and E. R. Hoffman the defendants at the bar, guilty on the — count of the Indictment, and — on the — count of the Indictment. Thomas H. Haskins, Foreman." No objection was made to this verdict when returned, nor at any time prior to May 31, 1919, long after the record came here, when permission was asked to amend the assignments of error.

Motions for new trial and in arrest of judgment were overruled. The former attacked the verdict as contrary to law and the evidence but said nothing concerning its form. The latter recited "And now after verdict against the said defendants and before sentence, come the said defendants in their own proper persons and by Daniel O'Connell their attorney and move the court here to arrest judgment herein and not pronounce the same,"

and specified the following grounds: (1) The indictment fails to set forth facts sufficient to constitute an offense; (2) The first count is repugnant to itself for reasons set forth in the demurrer; (3) The second count is based on the Act of May 18, 1917, inapplicable to the defendants because they were not engaged in carrying out its terms; (4) The first count does not adequately inform defendants concerning nature of charge against them; (5) Both the Acts of May 18 and June 15, 1917, are in conflict with the Constitution and are invalid.

September 29 O'Connell was sentenced to the penitentiary for five years on the first count and for two years on the second, the terms to run consecutively. The other plaintiffs in error were sentenced to varying concurrent terms under both counts, none being in excess of three years. On the same day a writ of error from this court was allowed.

The record contains a bill of exceptions, with an elaborate explanatory certificate signed by the District Judge.

The trial took place during July term, 1917; the next term as appointed by statute began November 15. On September 29, thirty days were granted for preparation and presentation of a bill of exceptions. October 23 an order undertook to extend the time to November 15; on November 12 a like order specified November 27; on November 26 an order specified December 15; on December 14 a further order undertook to extend it to December 24, when a still further extension was ordered to December 31. On the latter date a proposed bill was presented. January 9, 1918, the United States attorney procured an order granting time in which to prepare amendments to the proposed bill which were thereafter presented.

Rule 9 of the District Court provided: "For the purpose of making and filing bills of exceptions and of making any and all motions necessary to be made within the term at which any judgment or decree is entered, each

term of this court shall be and hereby is extended so as to comprise a period of three calendar months beginning on the first Tuesday of the month in which verdict is rendered or judgment or decree entered." Rule 61 provided: When an act to be done in any pending suit relates to the preparation of bills of exceptions or amendments thereto, "the time allowed by these rules may, unless otherwise specially provided, be extended by the court or judge by order made before the expiration of such time, but no such extension or extensions shall exceed thirty days in all, without the consent of the adverse party."

After expiration of the three months specified by Rule 9, plaintiffs in error having in open court requested further extension, the United States attorney announced that he would not consent but would ask the court to refuse to settle any bill thereafter proposed. In April, 1918, he moved that settlement of the proposed bill be refused and that it be stricken from the files. The court expressed the opinion that the bill was too late unless the United States attorney had waived objection thereto, and on that point said: "I am very strongly of the view that, owing to the attitude of the United States attorney, distinctly stated theretofore, which was all that could be done under the circumstances, this was not such a waiver." But, in order that the matter might be brought here for final determination, the facts were set out and the certificate signed.

Under the statute the trial term expired November 15; but, for the purpose of filing the bill of exceptions, a general rule extended it to December 4—three months from the first Tuesday in September. The last order of court within the extended term designated December 15 as the final day for action.

"By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a

formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties . . . After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end." *Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293, 298.

We think the power of the trial court over the cause expired not later than the 15th of December, 1917, and any proceedings concerning settlement of a bill thereafter were *coram non judice*. We may not, therefore, consider the bill copied in the record. *Hunnicutt* v. *Peyton*, 102 U. S. 333; *Davis* v. *Patrick*, 122 U. S. 138; *Waldron* v. *Waldron*, 156 U. S. 361; *Jennings* v. *Philadelphia, Baltimore & Washington Ry. Co.*, 218 U. S. 255, 257. And the same is true of certain notes of proceedings taken during trial which we directed to be brought here, without prejudice, by order of June 9, 1919.

The motion to amend original assignments of error is granted. Having regard to the record properly before us only four of the assignments require special notice: (1) Unconstitutionality of the Selective Service and the Espionage Acts; (2) That the first count is bad because it only charges a conspiracy to obstruct the recruiting and enlistment service by inducement and persuasion; (3) The verdict was fatally defective and the judgment invalid; (4) The second count is bad. It charges a conspiracy to make false certificates concerning liability for military service and to aid in evading the act without alleging that the conspirators were officers or persons charged with the duty of carrying it into effect.

The constitutionality of the two acts is settled by opin-

ions of this court announced since the writ of error was sued out. *Goldman* v. *United States*, 245 U. S. 474; *Schenck* v. *United States*, 249 U. S. 47; *Frohwerk* v. *United States*, 249 U. S. 204. Also the criminality of a conspiracy to obstruct recruiting and enlistment by persuasion has been determined. *Schenck* v. *United States*, *supra*.

Apparently a printed form was used in preparing the jury's verdict, defendants' names and the word "guilty" being inserted. When presented no objection was made to its form or wording, neither the motion for new trial nor in arrest of judgment indicated any such objection, and plaintiffs in error mentioned none when called upon to show cause why sentence should not be imposed. We think the intention to find a general verdict of guilty upon both counts is sufficiently plain. Evidently all parties so understood at the time. See *Statler* v. *United States*, 157 U. S. 277, 279; *Ballew* v. *United States*, 160 U. S. 187, 197.

The second count charges a conspiracy to violate § 6 of the Selective Service Act. Its provisions include: "Any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this Act, or regulations made by the President thereunder, or otherwise evades or aids another to evade the requirements of this Act or of said regulations." Other words of the section relate to officers and persons charged with the duty of carrying the act into effect, but the quoted ones are broad enough to include non-official persons and, when considered in connection with the general purpose in view, there can be no reasonable doubt that plaintiffs in error were within their meaning. See *Fraina* v. *United States*, 255 Fed. Rep. 28, 33.

We find no adequate cause for interfering with the judgment of the court below and it is

Affirmed.